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No. 91-__

Supreme Court U.S.

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In The
Supreme Court of the United States
October Term, 1991

PACIFIC BELL, PACIFIC TELESIS GROUP,
PACIFIC TELEPHONE & TELEGRAPH COMPANY,
PACIFIC TELESIS GROUP PENSION PLAN FOR
SALARIED EMPLOYEES,

Petitioners,

v.

LANA PALLAS (aka Lana Hubbs),
and persons similarly situated,

Respondents.

Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decision of the court of appeals presents the following questions, on which the circuits are in conflict:

1. Does Title VII of the Civil Rights Act of 1964, which expressly provides that "it shall not be an unlawful employment practice for an employer to apply different * * * terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system," nevertheless prohibit an employer from using seniority unless the employer retroactively applies new legal requirements to long-established seniority dates to eliminate the present effects on seniority of past employment decisions that were lawful when they occurred, but have been prohibited by subsequent legislation?

2. Does ERISA impose an undefined standard of "discrimination" or "fairness," independent of the requirements of Title VII, that governs an employer's decision of what benefits to provide and to whom under an ERISA benefit plan?

PARTIES

All parties to the proceeding appear in the caption of the case except the following parties that were defendants and appellees in the court below and that, pursuant to Rule 12.4 of this Court's rules, are deemed to be respondents in this Court:

American Telephone & Telegraph Company
Bell System Management Pension Plan
Bell System Pension Plan

Petitioners submit the following list pursuant to Rule 29.1 of this Court's rules:

Petitioner Pacific Telesis Group has no parent corporations and no subsidiaries except wholly owned subsidiaries.

Pacific Telesis Group is the parent corporation of petitioner Pacific Bell, which it wholly owns.

Petitioner Pacific Bell has no subsidiaries except wholly owned subsidiaries, other than the following:

Bell Communications Research, Inc.

Certain wholly owned subsidiaries of petitioner Pacific Telesis Group have subsidiaries or subsidiaries of subsidiaries that are not wholly owned. These non-wholly owned subsidiaries include:

Cellular Communications, Inc.
PacTel Meridian Systems
South Yorkshire Cablevision Limited
ELT Acquisition Company Limited
Percom Services Limited (Thailand)
Mannesmann Mobilfunk GmbH

PARTIES-Continued

Pacific Telesis Ireland
METROPHONES Company Limited
Sistelcom, S.A.
Pacific Telesis (Hellas) Limited
Telecel-Comunicacoes Pessoais, S.A.
Tokyo Digital Phone Company
Athens Cellular, Inc.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case. The opinion of the court of appeals is reported at 940 F.2d 1324 and is included in the Appendix at pp. 1a to 12a. The order of the court of appeals denying rehearing is included in the Appendix at p. 13a. The opinion of the district court is set out in the Appendix at pp. 15a to 24a. The order of the court of appeals granting petitioners' motion to stay the mandate to and including

November 18, 1991 to permit the filing and subsequent disposition of a petition for certiorari, is included in the Appendix at p. 14a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on August 12, 1991. Petitioner's timely petition for rehearing was denied on September 26, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves section 703(h) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2(h), which provides, in pertinent part:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, * * * .

This case also involves section 404 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104, which is set out in the Appendix. App., p. 25a.

STATEMENT OF THE CASE

A. Nature of the case.

This action challenges petitioner Pacific Bell's decision to use petitioners' long-standing "Net Credited Service" system as a basis for determining eligibility for certain benefits under Pacific Bell's retirement plans. Like many employers, Pacific Bell relies on its employees' length of service as an established and neutral yardstick on which it can base benefits without the threat of a claim of discrimination. Respondent, however, claims that the amount of her service credit incorporates, and thus gives present effect to, an action that was lawful when it occurred in 1972 (when respondent filed a charge of discrimination, but elected not to bring suit), but, under a subsequent amendment to Title VII, would be unlawful if it occurred today.

Previous decisions of this Court and of other circuits have held that employers may rely on seniority for making employment decisions without reopening and revising established seniority dates to take account of past acts that are claimed to have a current discriminatory impact because they are incorporated in an employee's seniority. The court of appeals in this case, by contrast, has held that an employer's reliance on seniority should be deemed to constitute a present act of discrimination unless the employer continually revises established seniority dates to give retroactive effect to new legal requirements, or to eliminate the present effects of long past and closed acts that were not challenged (or were unsuccessfully challenged) at the time.

Under Pacific Bell's service crediting system (which was used for similar purposes by Pacific Bell's predecessor, Pacific Telephone & Telegraph Company, for many years before its divestiture from AT&T in 1984), a "Net Credited Service Date" is continuously maintained for all

employees from their initial hire until their retirement. An employee's Net Credited Service Date consists of the employee's original hiring date adjusted to take account of periods for which no service credit is accrued. As noted by the court of appeals, "[u]nder this system, an employee receives credit for time during which the employee is absent due to a temporary disability, but does not receive credit for time spent on personal leave." App., p. 3a.

Prior to the 1979 enactment of the Pregnancy Discrimination Act ("PDA"), the Bell System companies, including Pacific Telephone & Telegraph Company by whom respondent was employed, classified absences due to pregnancy as personal leaves rather than as disability leaves. That treatment was lawful when it occurred. In 1976, this Court ruled in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) that discrimination based on pregnancy did not violate Title VII. In response, Congress enacted the PDA, which became effective in 1979. 42 U.S.C. § 2000e(k).¹ Pacific Telephone immediately changed its practice and petitioners classified all pregnancy leaves taken after the 1979 enactment of the PDA as disability leaves, for which Net Credited Service has accrued.

¹ Section 2000e(k) provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. * * *

However, petitioners did not retroactively revise their existing employment records or change the existing net credited service dates of employees, such as respondent, who had taken pregnancy leaves prior to 1979.

Respondent Lana Pallas has been employed by Pacific Bell and, previously, Pacific Telephone & Telegraph Company, since 1967. Respondent became pregnant and took a leave in 1972. In accordance with the practice at that time, this absence was treated as a personal leave, rather than as a disability leave. Therefore, respondent did not accrue Net Credited Service during her absence. Respondent filed a charge of discrimination with the EEOC in 1972 challenging the classification of her leave as "personal," but elected not to bring suit.

In September 1987, Pacific Bell amended its retirement plan to include an early retirement option ("ERO") for which employees with certain amounts of Net Credited Service were eligible. In November 1987, respondent applied for the Company's "20-year plan" ERO. Respondent's complaint alleges that she would have been eligible for the 20-year ERO if Pacific Telephone had treated her 1972 absence from work due to pregnancy as a disability leave rather than as a personal leave. Respondent requested that Pacific Bell retroactively redefine her 1972 absence as a disability leave and adjust her accrued Net Credited Service Date accordingly. Pacific Bell denied that request.²

² However, on September 12, 1988, Pacific Bell's Employee Benefits Claims Review Committee adjusted respondent's Net Credited Service Date to give respondent service credit for September 6 to October 1, 1972 (a period during which respondent claims she was willing to return to work but was allegedly prevented from doing so), but declined to reclassify the period from July 23 to September 5, 1972, during which

(Continued on following page)

B. Proceedings below.

Respondent's complaint alleged that Pacific Bell's reliance on Net Credited Service in determining her eligibility for the ERO violated Title VII, the California Fair Employment and Housing Act and the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001, *et seq.*) ("ERISA"). Respondent asserted these claims on behalf of herself and others similarly situated.

The district court dismissed respondent's complaint for failure to state a claim upon which relief could be granted. App., p. 24a. The court held that Pacific Bell's determination to base eligibility for the 1987 ERO on service credit was a facially neutral policy that, under this Court's decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), did not violate Title VII.³ *Id.* at 19a-20a. The district court dismissed respondent's ERISA claim, accepting petitioners' argument that ERISA does not provide an independent standard of fairness or discrimination that regulates an employer's design of the benefit structure of an ERISA plan. *Id.* at 22a.

A divided panel of the Ninth Circuit reversed. The court acknowledged that eligibility for the ERO was based on seniority as measured by an employee's Net

(Continued from previous page)

respondent was indisputably absent and unavailable for work due to pregnancy. With this adjustment, respondent remained ineligible for the 20-year plan ERO as she was still short of the necessary amount of net service credit.

³ The court dismissed respondent's parallel state-law FEHA claim on the same ground, and because any effort to apply the FEHA beyond the scope of Title VII would be preempted by ERISA. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). App., pp. 21a-22a.

Credited Service date.⁴ Nonetheless, the majority concluded that Pacific Bell's seniority system "adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act." App., p. 6a. For that reason, the court held that Pacific Bell's 1987 decision to base eligibility for the ERO on seniority should be viewed as no different from a "decision to discriminate against Pallas in 1987 on the basis of pregnancy." *Id.* at 6a-7a. In its view, "the criteria adopted in 1987 to determine eligibility for the new benefit program" should be viewed as "not facially neutral," even though eligibility for the ERO concededly turned on the criterion of seniority (not pregnancy). *Id.* at 3a, 5a-6a. The majority further concluded that the respondent had stated a claim for relief under ERISA on the ground that "discrimination constitutes a fiduciary breach for purposes of ERISA." *Id.* at 7a.

The dissenting judge reasoned that eligibility for Pacific Bell's ERO was based on the facially neutral criterion of seniority which is "simply a method of record-keeping and mathematical calculation which determines how long an employee has worked for the employer." App., p. 8a. "[A]ll that the telephone company is currently doing is applying a bona fide seniority system, which is not discriminatory on its face, and is specifically authorized by Congress." *Id.* at 10a. "Neither we nor the telephone company can erase or change history. * * * Appellant's grievance is one that belongs to history; it is not a current violation of law." *Id.* at 10a-11a.

⁴ "To qualify for the benefit, an eligible employee must have accrued twenty years of service. The company measures an employee's length of service by a 'net credited service' system." App., p. 3a.

REASONS FOR GRANTING THE PETITION

As this Court has emphasized, "Seniority systems * * * are afforded special treatment under Title VII." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). Thus, from Title VII's inception, section 703(h) has provided that "notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * ." 42 U.S.C. § 2000e-2(h). Nevertheless, the court of appeals has held that employers may not rely on seniority unless they continually revise their employees' regularly established seniority dates to give retroactive effect to new legal requirements. That decision fails to adhere to the plain language of section 703(h), and frustrates the important federal policy that it embodies.

This Court and other courts of appeals have held that reliance on facially neutral seniority and service crediting systems is protected by Title VII even if it gives some present effect to a previous employment decision that was *not* lawful when it was made, but has since become a permanent part of the employee's work history. That result follows *a fortiori* in the present case, where the decision to treat plaintiff's 1972 absence as a personal leave rather than as a disability leave *was* lawful when it was made and respondent elected not to pursue her charge of discrimination at that time. In erroneously holding to the contrary, the Ninth Circuit majority did not even mention the clear language of section 703(h), which should have been dispositive. Nor did it recognize the distinction consistently drawn by this Court – and applied by other courts of appeals – between the present effect given to a past act by a seniority system, on the one hand, and a present act of discrimination, on the other.

The court of appeals' decision is of immense practical and legal importance not only for petitioners, but for all employers. "Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this nation." *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 766 (1976). Seniority provides one of the most common and fair means of making a wide variety of employment decisions, ranging from eligibility for pensions and other benefits as in this case, to bidding for job assignments and work schedules, to layoffs, promotions and recalls. Congress recognized this fact when it enacted section 703(h). As this Court has repeatedly held, section 703(h) permits an employer to rely on seniority at all times, not merely if all of the past, component decisions that make up seniority would be valid if current legal requirements were retroactively applied to them. This holding that use of a seniority system is permissible even if it arguably "perpetuates" the effects of past acts is essential if the congressional approval of the use of seniority in section 703(h) is to have any meaning, because, by its very nature, seniority incorporates the results of all previous employment decisions.

If permitted to stand, the court of appeals' decision will undermine the use of seniority rather than freely permit it as Congress intended. The inevitable result will be to force employers either to attempt to reopen and investigate each underlying decision that comprises each employee's seniority to take account of all past acts that might now be thought to have been discriminatory even though they were completely lawful at the time (or, if unlawful, were not subject to a timely challenge), or, alternatively, to abandon the use of seniority altogether. In either event, the will of Congress will have been frustrated.

As this Court has recognized, the "special treatment" [accorded seniority systems under Title VII] strikes a balance between the interests of those protected against discrimination by Title VII and those who work – perhaps for many years – in reliance upon the validity of a facially lawful seniority system. * * * [A]llowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that § 703(h) was meant to protect.

Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 912 (1989).⁵ Thus, even putting aside the practical impossibility of the obligation imposed by the court of appeals continually to reevaluate each component decision that comprises seniority to give retroactive effect to new legal requirements or to take account of time-barred episodes of alleged discrimination, that requirement would frustrate the valid reliance interests of other employees

⁵ Section 112 of the Civil Rights Act of 1991, as recently passed by the Congress, contains an amendment that would allow "a seniority system that has been adopted for an intentionally discriminatory purpose" to be challenged "when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system." 56 Cong. Rec. S15275 (daily ed. Oct. 25, 1991). The amendment does not apply to this case because there is no claim that Pacific Bell's long-standing seniority system was "adopted for an intentionally discriminatory purpose." While the amendment may affect the specific holding of *Lorance v. AT&T Technologies, Inc.*, *supra*, in cases involving seniority systems adopted for an intentionally discriminatory purpose, it does not affect its broader discussion of the purposes of section 703(h).

regarding such matters as job assignments, work schedules, promotions and layoffs that Congress intended to protect.

Prompt review by this Court is warranted to resolve the conflict in the circuits on this issue, and to alleviate the uncertainty and confusion that the Ninth Circuit's decision has injected into the previously well-understood principles applied to seniority and service crediting systems by this Court. The Ninth Circuit's rationale appears to turn on the fact that the benefits program at issue – although basing eligibility on seniority – was a “new” program adopted subsequent to the enactment of the PDA. This is an insupportable interpretation of this Court's decisions construing section 703(h), which sustain the use of seniority systems for determining terms and conditions of employment regardless of whether the programs at issue are “new” programs or “old” programs. *Infra*, pp. 18-20. No other circuit has adopted the Ninth Circuit's novel and highly restrictive interpretation of section 703(h).

The effect of the Ninth Circuit's attempt narrowly to confine section 703(h) will be to create a strong incentive for employers to freeze existing benefit programs, rather than revise them as they otherwise would to take account of new economic and workplace conditions. Nor are the effects of the decision below limited to a few businesses or to the Ninth Circuit. Many employers with national operations both within and outside the Ninth Circuit base employment decisions on seniority or service credit. If they are to treat their employees equally, they must attempt to conform to the Ninth Circuit's decision nationwide (by freezing benefits programs, abandoning use of seniority altogether, or attempting in some manner retroactively to reevaluate each component decision that comprises the seniority dates contained in company records),

even though other circuits have rendered conflicting decisions. Moreover, the problems created by the Ninth Circuit's approach are not confined to the PDA. Employers could face demands that they revise seniority dates to give retroactive effect to all new legal requirements governing employment decisions (such as, for example, the Family Leave bills now pending in Congress) that are regularly imposed in this rapidly evolving area. The grant of certiorari is necessary to prevent these wide-ranging and unwarranted effects of the Ninth Circuit's erroneous interpretation of section 703(h).

Certiorari should also be granted to review the Ninth Circuit's decision that ERISA, independently of the provisions of Title VII, prohibits an employer from "discriminating" in determining what benefits to provide and to whom under an ERISA benefit plan. The Second, Third, Sixth, Seventh and Eighth Circuits have rendered conflicting decisions, holding that ERISA's fiduciary duty requirement imposes no independent standard of discrimination or fairness to govern an employer's design of an ERISA benefit plan. Congress refrained from imposing such an undefined prohibition to encourage employers to create and fund such purely voluntary plans. The Ninth Circuit's contrary decision thus undermines Congress' intent in enacting ERISA, as well as Title VII.

I. THE DECISION OF THE COURT OF APPEALS IS IRRECONCILABLE WITH THE PLAIN LANGUAGE OF SECTION 703(h) AND WITH THIS COURT'S DECISIONS APPROVING THE USE OF STABLE SENIORITY SYSTEMS FOR MAKING EMPLOYMENT DECISIONS.

A. This Court's decisions interpret section 703(h) in accord with its plain language to permit the use of seniority despite its alleged present discriminatory impact.

Beginning with *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), this Court has consistently

sustained the use of stable and predictable seniority systems to make employment decisions. In *Franks*, the Court held that, where a timely claim of discrimination is brought, section 703(h) does not prevent the district court from remedying a violation of Title VII that exists *independently* of the operation of the seniority system by awarding retroactive seniority to the individuals discriminated against. *Id.* at 758. However, the Court explicitly recognized that section 703(h) does bar claims like those in the present case, in which the plaintiff claims that the use of seniority itself has given a long past and closed act a present discriminatory effect on current rights and benefits:

[T]he thrust of [section 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances *in which the post-act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.*

Id. at 761 (emphasis added). In reaching that conclusion, this Court relied not only on the plain language of section 703(h), but on the legislative history of Title VII. That history clearly indicates that, even though an employee's seniority may have been adversely affected by a previous act of discrimination, "any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." *Id.* at 760-761 n. 16 (quoting Department of Justice Statement on Title VII). The legislative history also establishes that Title VII was *not* intended to "require an employer to change existing seniority lists," as respondent contends in this case. *Id.*

Franks' recognition that section 703(h) was intended to bar claims such as those here formed the basis for this Court's subsequent decision in *Teamsters v. United States*, 431 U.S. 324 (1977). Plaintiffs claimed that, before Title

VII was enacted, the employer had engaged in a pattern or practice of racial discrimination, and that the employer's use of seniority after the enactment of Title VII for the purpose of determining current "benefits, such as vacations, pensions, and other fringe benefits" (*id.* at 343) was unlawful because it had the effect of perpetuating the effects of those previous acts of discrimination. The district court and the court of appeals had held that this use of seniority violated Title VII because it " 'locked' minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers." *Id.* at 344.

This Court reversed, holding that section 703(h) immunizes an employer from liability for the discriminatory impact of using seniority as a basis for current determinations of benefits and other conditions of employment, even though, as is claimed to be true in this case, "the seniority system operates to carry the effects of the earlier discrimination into the present." *Id.* at 344-345 n. 27. Specifically, despite the fact that facially neutral seniority systems may be viewed as "one kind of practice 'fair in form, but discriminatory in operation' * * * which perpetuates the effects of prior discrimination" that would otherwise violate Title VII (*see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)),⁶ "both the literal terms of

⁶ Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority

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§ 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them." 431 U.S. at 350. This Court reiterated that "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes" and the use of seniority, therefore, "inevitably tends to perpetuate the effects of pre-Act discrimination in such cases." 431 U.S. at 352-353. Accordingly, "*we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.*" *Id.* at 353-354 (emphasis added).

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), this Court extended the rationale of *Teamsters* to a case where the use of seniority perpetuated the effects of discriminatory acts that, unlike those in *Teamsters* and in this case, were *unlawful* when they occurred but had not been challenged at that time. In *Evans*, the plaintiff was forced to resign in 1968 after she married. Resigning employees lost all seniority. United subsequently ended this discriminatory practice, but when plaintiff was rehired United gave her no seniority credit for the period of her forced resignation. This Court assumed that the 1968 forced resignation would have been found unlawful

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system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act.

Id. at 349-350 (emphasis added).

had it been subject to a timely challenge, and addressed the question of "whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972." *Id.* at 554. The Court again ruled that a seniority system does not violate Title VII even though it "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557.

[A] challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.

Id. at 560.

Thus, even if, despite this Court's decision in *Gilbert, supra*, petitioners' 1972 treatment of respondent's pregnancy had been unlawful when it occurred (which it was not), *Evans* makes it clear that petitioners were:

entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.

Id. at 558.⁷

In *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), this Court held that section 703(h) is not confined to seniority systems adopted before the passage of Title

⁷ In the present case, respondent filed a timely charge with the agency with respect to her 1972 leave, but failed to pursue that charge by filing a timely complaint within 90 days after receiving her right-to-sue letter as prescribed in 42 U.S.C. § 2000e-5(f).

VII, but extends as well to protect newly adopted seniority systems, even though the result of such "new" uses of seniority is to perpetuate the effects of earlier acts of discrimination. Relying on the "plain language of § 703(h)," which, on its face, makes no distinction between "old" and "new" uses of seniority, this Court held that the statute insulates the alleged discriminatory impact of such systems from challenge under Title VII regardless of when they were adopted. *Id.* at 77. Any other result not only would be inconsistent with the language of section 703(h), but would discourage employers from "modifying pre-Act seniority systems or post-Act systems whose adoption was not timely challenged." *Id.* at 71. This Court emphasized that:

Our prior decisions have emphasized that "seniority systems are afforded special treatment under Title VII itself," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977), and have refused to narrow § 703(h) by reading into it limitations not contained in the statutory language. In *Teamsters v. United States*, * * * we held that § 703(h) exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of pre-Act racially discriminatory employment practices. Similarly, by holding that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed," *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977), the Court interpreted § 703(h) to immunize seniority systems which perpetuate post-Act discrimination. Thus, taken together, *Teamsters* and *Evans* stand for the proposition stated in *Teamsters* that "[s]ection 703(h) on its face immunizes all bona fide seniority systems,

and does not distinguish between the perpetuation of pre- and post-Act" discriminatory impact. * * * *Section 703(h) makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date.*

Id. at 75-76 (emphasis added).

The court of appeals in this case made no attempt to apply the distinction drawn in this Court's cases between a current act of discrimination, on the one hand, and the current impact given to a prior act by seniority, on the other. To the contrary, the panel reasoned that Pacific Bell had violated Title VII because:

In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act.

App., p. 6a (emphasis added). *Evans*, however, holds exactly the opposite: *Evans* ruled that even though United's seniority system "does indeed have a continuing impact on [plaintiff's] pay and fringe benefits" as a result of United's previous act of sex discrimination, United's practice of basing current pay and benefits on seniority, with the "present effect" of adopting and "perpetuat[ing]" that previous act of discrimination, was "neutral in its operation." 431 U.S. at 557-558. Accordingly, it was not a present violation of Title VII.

B. The fact that Pacific Bell's 1987 ERO was a "new" program is irrelevant. Section 703(h) protects both old and new programs based on seniority.

The court of appeals attempted to distinguish *Teamsters* and *Evans*, primarily on the ground that the alleged "discriminatory program" at issue was a new program that had been adopted in 1987. App., pp. 5a-6a. Thus, the majority concluded, "this is not a belated attempt to

litigate the discriminatory impact of a pre-Pregnancy Discrimination Act program." *Id.* Rather, "Pallas challenges the criteria adopted in 1987 to determine eligibility for the new benefit program." *Id.*

This analysis disregards both the clear language of section 703(h) and the central rationale of this Court's decisions. The very point of section 703(h) as construed in *Teamsters* and *Evans* is that a current decision to base pay or other benefits on seniority, as in the present case, "shall not be an unlawful employment practice" even though such use of seniority may give a previous act a current "impact." The issue in *Evans* was not whether plaintiff had filed a timely claim. Rather, the question was whether, given the company's discriminatory action in 1968, "the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972" when she returned to work. 431 U.S. at 554. This Court held that despite the 1972 impact of seniority on her pay and other benefits "she has not alleged facts establishing a violation since she was rehired in 1972." *Id.* at 559.

Thus, the court of appeals' conclusion that respondent had made a timely challenge to Pacific Bell's "new" use of her Net Credited Service Date to determine eligibility for the ERO in 1987 does not address the controlling legal principle: It was not a current act of discrimination for Pacific Bell to rely on Net Credited Service as the criterion for determining eligibility for a retirement benefit. Nothing in the language of section 703(h) or the rationale of this Court's decisions turns on whether the employee benefit program or wage scale at issue is an "old" wage scale or benefit program or a "new" wage scale or benefit program.⁸ *Teamsters* and *Evans* clearly

⁸ Indeed, in *Bazemore v. Friday*, 478 U.S. 385 (1986) (*infra*, p. 22), on which the panel relies, the pay system at issue was an

uphold all programs that base current pay or benefits on seniority, whether they are "new" programs or "old" programs (or, as is true in this case, amendments to old programs). Clearly, if, as this Court held in *American Tobacco, supra*, section 703(h) immunizes the adoption and the application of entirely new seniority systems after the enactment of Title VII despite their conceded discriminatory impact, Pacific Bell's use of its *existing* and long-standing service crediting system for the purpose of determining eligibility for its 1987 ERO was also lawful.

C. Eligibility for Pacific Bell's 1987 ERO was based on the facially neutral criterion of seniority, not pregnancy.

The court of appeals' majority also suggested that *Evans* and *Teamsters* are not on point because the "net credit system used to calculate eligibility under the Early Retirement Opportunity is *not facially neutral*" but "facially discriminates against pregnant women." App., p. 6a (emphasis added). The panel stated that under the 1987 ERO, Pacific Bell employed "a method of calculating employee service time that does not credit pregnancy leaves taken prior to 1979 but credits temporary disability leaves taken during the same period." *Id.* at 2a. The panel erroneously implies that respondent's 1972 pregnancy was expressly considered by the company in determining her eligibility for the ERO, stating that the company

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"old" system adopted prior to the implementation of Title VII. Conversely, in *Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978) (*infra*, p. 24), the pay practice upheld under *Evans* was an employer's current salary schedule basing pay on seniority, which plaintiff claimed had been unlawfully reduced as a result of a previous failure to credit her maternity leave.

"informed [respondent] that she was not eligible for the benefit because, as a result of a pregnancy-related leave she took in 1972," she lacked the necessary seniority. *Id.* at 3a.

To the contrary, neither Pacific Bell's 1987 ERO nor any of its other benefit programs employed eligibility criteria that depended on, or even mentioned, whether an employee had taken a pregnancy leave, either before or after 1979. The complaint itself alleges that "at all times relevant herein, defendants maintained a Net Credited Service Date for each of defendants' employees" which they used "*to measure an employee's length of service for purposes of determining entitlement to and eligibility for*" benefits. ER 8 (emphasis added).⁹ As the dissenting judge in the court of appeals correctly recognized:

The appellee telephone company has simply applied a seniority system, which it uses as the criterion for according many kinds of employee benefits, and appellant simply did not have enough seniority to qualify for the early retirement which she sought.

App., p. 8a (footnote omitted).

Thus, eligibility for benefits for Pacific Bell's 1987 ERO did not, on its face, turn on "pregnancy vs. disability," as the panel implies. Rather, it turned on the facially neutral criterion of seniority, which included the period of disability leaves, but not "personal" leaves. Pacific Bell's seniority system did not, on its face, discriminate by "assign[ing] men twice the seniority that women receive for the same amount of time served * * *," thus treating "similarly situated employees differently." *Lorance v. AT&T Technologies, Inc.*, *supra*, 490 U.S. at 912 &

⁹ The citation is to the Excerpt of Record filed in the court of appeals.

n. 5. Rather, on its face it assigned all employees service credit for disability leaves, but not for personal leaves, treating all similarly situated employees the same. Respondent's complaint is not with the Pacific Bell seniority system itself, which on its face properly differentiates between personal leaves and disability leaves. Rather, it is with Pacific Telephone's 1972 decision to treat her pregnancy leave as a personal leave – a decision that was lawful when it occurred.

The court of appeals' heavy reliance on *Bazemore v. Friday*, 478 U.S. 385 (1986) (App., p. 6a) was clearly misplaced. *Bazemore* did not involve the alleged current discriminatory impact of basing pay or other benefits on seniority. Rather, in *Bazemore*, the employer commenced the practice of paying blacks less than whites for the same work before the effective date of Title VII, and continued that practice after Title VII became effective. *Seniority was not involved at all*. This Court merely held that the fact that an unlawful employment practice which *currently bases an employee's pay on the forbidden criterion of race* (not seniority) had commenced before Title VII became effective could not immunize the employer from liability for its continuing and current acts of basing pay on race. At the same time, however, the Court stressed "recovery may not be permitted for pre-1972 acts of discrimination." *Id.* at 395. The court of appeals' sweeping extension of *Bazemore* beyond current acts of discrimination to encompass the current effects given by a seniority system to past acts that were lawful when they occurred, thus giving retroactive effect to new legal requirements, is irreconcilable with section 703(h) as it has been interpreted and applied by this Court.

In this case, by contrast to *Bazemore*, Pacific Bell does not currently base the availability of any employee benefit on the forbidden criterion of pregnancy, but rather on

the lawful and neutral criterion of seniority. Petitioners did not establish respondent's seniority date in 1987. Rather, the pre-1979 rule classifying pregnancy leaves as personal leaves for which no seniority credit would be given *was applied when plaintiff took her leave in 1972. Plaintiff's resulting seniority date was then established throughout the entire period of her employment with the company.* The only action taken by Pacific Bell in 1987 was to apply respondent's already established and facially neutral seniority date – which necessarily incorporated the results of all previous decisions affecting seniority – to determine her eligibility for the 1987 ERO. In so doing, it did not refer to pregnancy at all. The only reason that respondent's 1972 pregnancy ever appeared in the record was because she requested the company retroactively to *change* her previously established seniority date as it appeared in the company records. That is the very thing that, under section 703(h), the company need not do. Prior to the present decision, no court had held that a system for determining employment benefits, which "on its face" does not refer in any way to a forbidden criterion, should nevertheless be treated as "facially discriminatory."

II. THE PANEL'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REJECTING SIMILAR CLAIMS UNDER TITLE VII.

Review is also necessary to resolve a conflict in the circuits. The Second and Eighth Circuits have rejected claims indistinguishable from those of respondent here. *See Schwabenbauer v. Bd. of Educ. of City of Olean*, 777 F.2d 837 (2d Cir. 1985) (rejecting plaintiff's claim that her 1972 dismissal constituted a current violation of Title VII since she would have had enough service to receive tenure but for defendant's failure to credit her 1970 maternity leave);

Farris v. Board of Ed. of City of St. Louis, 576 F.2d 765 (8th Cir. 1978) (rejecting plaintiff's claim that defendant's current salary schedule, which depended on length of service, violated Title VII since plaintiff's mandatory maternity leave absences taken before 1972 were not credited). See also *Trabucco v. Delta Airlines*, 590 F.2d 315 (6th Cir. 1979); *Simmons v. South Carolina State Ports Authority*, 495 F. Supp. 1239 (D.S.C. 1980), *aff'd*, 694 F.2d 63 (4th Cir. 1982).

Thus, in *Schwabenbauer*, the Second Circuit noted that Title VII did not apply to school boards until 1972 and that defendant's failure to credit plaintiff's maternity leave in 1970 was not unlawful at that time. The court ruled that to apply the 1972 statute to require such credit in determining whether plaintiff had "tenure" precluding her dismissal in 1972 would improperly:

give retroactive effect to a statute creating new rights where none had previously existed. The manifest injustice of such *ex post facto* imposition of civil liability is reflected in the general rule of construction that absent clear legislative intent statutes altering substantive rights are not to be applied retroactively * * * .

777 F.2d at 840 (emphasis in original) (quoting *Weise v. Syracuse University*, 522 F.2d 397, 411 (2d Cir. 1975)).

Precisely the same analysis applies to the court of appeals' erroneous application of the 1979 Pregnancy Discrimination Act in this case to require that respondent's seniority date be retroactively revised so that she receives service credit for her 1972 pregnancy leave.

III. THE PANEL'S DECISION ALSO CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS HOLDING THAT AN EMPLOYER DOES NOT ACT AS A FIDUCIARY IN DESIGNING THE BENEFIT STRUCTURE OF AN ERISA PLAN.

The majority summarily concludes, in a single paragraph, that "discrimination constitutes a fiduciary breach

for purposes of ERISA." App., p. 7a. But this Court has explicitly stated that ERISA "*does not itself proscribe discrimination in the provision of employee benefits.*" *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (emphasis added). The court of appeals' contrary decision constitutes an unprecedented revision of settled ERISA principles and is in conflict with decisions in the Second, Third, Sixth, Seventh and Eighth Circuits.

Those other courts have correctly held that employer decisions to create, allocate benefits under, amend or even terminate a benefit plan are not to be judged by fiduciary standards. *See, e.g., Fletcher v. The Kroger Co.*, 942 F.2d 1137, 1139 (7th Cir. 1991) (employer's decision to provide special retirement benefits to employees at some plants but not at others did not violate ERISA's fiduciary duty standards because an employer does not act as a fiduciary when it makes the initial decision as to what the plan will provide); *Adams v. LTV Steel Mining Co.*, 936 F.2d 368 (8th Cir. 1991); *Belade v. ITT Corporation*, 909 F.2d 736, 737-738 (2d Cir. 1990) ("an employer's decision to exclude certain employees from the design of an early retirement program" does not implicate ERISA fiduciary duties); *Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) ("there is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second"); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) (single-employer plan did not breach fiduciary duty by discriminating in adopting ERO for the benefit of some participants but not others); *Amato v. Western*

Union Intern., Inc., 773 F.2d 1402, 1416 (2d Cir. 1985).¹⁰ As the court of appeals explained in *Musto, supra*:

The case law * * * makes it clear that when an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

861 F.2d at 912.

ERISA does contain specific restrictions on the substantive provisions of pension plans.¹¹ These specific statutory provisions, however, are the sole limits which ERISA places on the terms of an employer's plan. No provision of ERISA empowers a court to review the substantive provisions of an employer's plan for conformity to any standard of "reasonableness," "fairness" or "discrimination."¹² An employer may be a fiduciary in *carrying out* the provisions of a plan that it has designed, but it

¹⁰ The Ninth Circuit's decision is at odds with previous decisions within that circuit as well. See *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 631 (9th Cir. 1990); *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988); *West v. Greyhound Corp.*, 813 F.2d 951, 955-956 (9th Cir. 1987) (single-employer plan changes "are not to be reviewed by fiduciary standards").

¹¹ For example, single-employer pension plans must begin to vest employees by, at latest, their fifth year. 29 U.S.C. § 1053.

¹² [A]n employer has no affirmative duty to provide employees with a pension plan. H.Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), reprinted in [1974] U.S.Code Cong. and Ad.News, 4670, 4677. In enacting ERISA, Congress continued its reliance on *voluntary* action by employers by granting substantial tax advantages for the creation of qualified retirement programs. *Id.* Neither Congress nor the courts are

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is not a fiduciary in determining the design of the plan itself. "ERISA permits employers to wear 'two hats.'" *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985). Employers "assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators" – not when they design their pension plans and act as a corporate employer. *Id.* at 1416-1417 (quoting *Amato v. Western Union Intern., Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)). Thus, while ERISA provides for judicial review of the *administration* of ambiguous provisions of a plan to determine whether those provisions have been construed in an arbitrary or capricious manner,¹³ review of an employer's selection of

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involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation. Absent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan.

Moore v. Reynolds Metals Co. Retirement Program, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) (footnote and citation omitted; emphasis added).

¹³ The court of appeals erroneously implies, without elaboration, that respondent may have stated a claim challenging the way in which the plan was administratively interpreted and applied to her, rather than the design of the plan's benefit structure itself. It states that respondent "challenges the manner in which the Early Retirement Opportunity program was applied to her" and that "[c]alculation of the service term for purposes of eligibility in the program is an act subject to

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which benefits to provide to particular classes of employees is not intended under ERISA.

The court of appeals' reliance on *Elser v. I.A.M. Nat. Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983) (App., p. 7a) was misplaced, because *Elser* involved a multi-employer plan, established by collective bargaining under the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), under which a pooled fund was administered jointly by labor and management representatives.¹⁴ In such a case, the plan's administrators do not act as an employer in deciding what benefits to provide and to whom they will be provided, but rather as administrators in managing the plan assets that have already been provided through collective bargaining. In *Musto, supra*, the court of appeals explained this important – and previously well-understood – distinction between reviewing the terms of a *multi-employer* pension plan for the general fairness of its "allocation" of benefits and reviewing

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review for breach of fiduciary duty." App., p. 7a. However, there is no issue of improper plan interpretation or administration in this case. The court of appeals failed to mention that respondent's complaint admits that the *plan itself* made all of its benefits dependent on Net Credited Service (ER 8, ¶ 34; ER 10, ¶ 40), and that her Net Credited Service did not include the period of her pre-1979 pregnancy leave (ER 9, ¶ 38). The panel also failed to note that the district court granted respondent leave to amend to attempt to state a claim for improperly administering the plan by failing to interpret and apply it in accordance with its provisions. Respondent declined that opportunity. Thus, as the district court correctly concluded, no issue of alleged misinterpretation of the plan in determining respondent's net credited service is presented.

¹⁴ See also, e.g., *Winpisinger v. Aurora Corp. of Ill., Etc.*, 456 F. Supp. 559 (N.D. Ohio 1978).

the terms of a *single-employer* plan such as that in this case:

In amending a *multi-employer* plan, where the level of contributions of each participating employer has generally been set by collective bargaining, the trustees "affect the allocation of a finite plan asset pool between participants," as defendants point out in their brief, *and hence act as plan administrators subject to a fiduciary duty*. But when, as here, there is only one employer, there is normally no "plan asset pool" to be affected. *In amending a single employer plan, therefore, the company normally acts in its role as employer, not in its role as fiduciary*.

861 F.2d at 912 (emphasis added).

An employer's plan design decisions are of course subject to independent legal requirements, such as Title VII.¹⁵ But *ERISA itself* provides no independent standard or prohibition of "discrimination" that restricts or regulates an employer's decision as to what benefits to provide or how they should be allocated among its employees. Congress carefully refrained from importing such an undefined and wide-ranging standard of judicial review to avoid the deterrent effect such review would obviously have on employers' willingness to create and

¹⁵ Congress specifically declined to amend ERISA to include a substantive prohibition of discrimination analogous to that of Title VII on the ground that the matter was adequately dealt with by Title VII. Senator Mondale's proposed amendment to ERISA that would have prohibited discrimination based on race, color, national origin or sex by any plan covered by ERISA, was withdrawn on the ground that discrimination was adequately dealt with under Title VII. 119 Cong. Rec. 24456-24457, 30410 (1973). See also 120 Cong. Rec. 4276 (1974) (remarks of Ms. Abzug and Mr. Dent).

fund such purely voluntary plans for the benefit of their employees.

The court of appeals' decision in this case injects new uncertainty into this previously settled area of ERISA law, and prevents employers from knowing with any assurance what requirements the law imposes on their design of a benefit plan. The conflict in the circuits and the broad importance of this issue to the willingness of employers to revise old plans and create new plans for the benefit of their employees make this issue independently worthy of this Court's attention.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
FOR PUBLICATION

LANA PALLAS,)	No. 90-15559
)	D.C.No.
<i>Plaintiff-Appellant,</i>)	CV-89-2373-DLJ
v.	)	OPINION
)	
PACIFIC BELL; PACIFIC)	
TELESIS, et al.,)	
<i>Defendants-Appellees.</i>)	

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted

May 15, 1991 - San Francisco, California

Filed August 12, 1991

Before: Mary M. Schroeder and Jerome Farris, Circuit Judges, and Edward Dumbauld,* District Judge.

Opinion by Judge Schröder;
Dissent by District Judge Dumbauld

*Honorable Edward Dumbauld, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

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C. Douglas Floyd, Pillsbury, Madison & Sutro, San Francisco, California, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

Lana Pallas filed this suit against her employer, Pacific Bell, and its predecessor companies (collectively "Pacific Bell"), claiming that the company has discriminated against her on the basis of gender and pregnancy. Pacific Bell denied her retirement benefits in 1987 based on a method of calculating employee service time that does not credit pregnancy leaves taken prior to 1979 but credits temporary disability leaves taken during the same period. Pallas brought this action under the Pregnancy Discrimination Act provisions of Title VII, 42 U.S.C. § 2000e *et seq.*; ERISA, 29 U.S.C. §§ 1001 *et seq.*; and the California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.*

The district court interpreted Pallas's complaint to allege only that discrimination occurred prior to 1979, when the law did not require employers to treat pregnant women like temporarily disabled men. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Thus, the district court dismissed the complaint

for failure to state a federal claim. Because we hold that the complaint states a claim for discrimination occurring in 1987 when Pacific Bell denied Pallas retirement benefits, we reverse. See *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986).

FACTS

In 1987, Pacific Bell instituted a new retirement benefit for management employees called the "Early Retirement Opportunity." To qualify for the benefit, an eligible employee must have accrued twenty years of service. The company measures an employee's length of service by a "net credited service" system. Under this system, an employee receives credit for time during which the employee is absent due to a temporary disability, but does not receive credit for time spent on personal leave. Prior to enactment of the Pregnancy Discrimination Act, Pacific Bell required employees disabled by pregnancy to take personal leaves. After 1979, Pacific Bell changed its policy to allow employees with pregnancy-related disabilities to take disability leaves. Under the current "net credited service" system, employees disabled by pregnancy prior to 1979 do not receive service credit for their pregnancy-related leaves.

Pallas, who had been employed by Pacific Bell and its predecessor companies since 1967, applied for the Early Retirement Opportunity. By letter dated October 11, 1988, the company informed her that she was not eligible for the benefit because, as a result of a pregnancy-related leave she took in 1972, she was three to four days short of the necessary amount of service credit. This suit followed.

DISCUSSION

The Pregnancy Discrimination Act amended Title VII to redress discrimination based on a woman's pregnancy. See 42 U.S.C. § 2000e(k); *Newport News Shipbuilding & Dry Dock Co. v EEOC*, 462 U.S. 669, 684, 103 S.Ct. 2622, 2631, 77 L.Ed.2d 89 (1983) ("The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex"). The Act requires employers to treat pregnancy disabilities in the same manner as other temporary medical disabilities for "all employment-related purposes, including receipt of benefits under fringe benefit programs." 42 U.S.C. § 2000e(k).¹

¹ Section 703(a) of Title VII provides that it is an "unlawful employment practice" for an employer:

- (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Congress amended Title VII in 1978 to provide that:

[t]he terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical

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The district court dismissed Pallas's Title VII claim on the basis of a series of Supreme Court decisions interpreting a special provision of Title VII concerning seniority systems, 42 U.S.C. § 2000e-2(h). *See, e.g., Lorange v. AT & T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). In this line of decisions, the Supreme Court held that disparate impacts resulting from a bona fide seniority system that is facially neutral must be challenged within the statute of limitations from the time the system is adopted; with a facially neutral system, the discriminatory act occurs at the time of adoption and subsequent applications do not constitute continuing violations. *See Lorange*, 490 U.S. at 911-13, 109 S.Ct. at 2268-69; *Evans*, 431 U.S. at 557-58, 97 S.Ct. at 1888-89.

The district court erred in relying on *Evans* and its progeny. These cases are inapposite in two determinative respects. First, the discriminatory program which gave rise to this suit, the Early Retirement Opportunity, was instituted in 1987. This is not a belated attempt to litigate the discriminatory impact of a pre-Pregnancy Discrimination Act program. Pallas challenges the criteria

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conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act).

adopted in 1987 to determine eligibility for the new benefit program. The claim could not have been brought earlier. Second, the net credit system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women. The system distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.

The controlling Supreme Court precedent is *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). In *Bazemore*, the employer had, prior to the enactment of Title VII, maintained two separate, racially segregated work forces and paid whites more than blacks. The Court held that pay disparities which remained after the enactment of Title VII were unlawful. "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395-96, 106 S.Ct. at 3006. Although the employer was not liable for acts of discrimination that occurred prior to the enactment of Title VII, the Court held that an employer could be held liable for discrimination perpetuated after the Act took effect. *Id.* at 395, 106 S.Ct. at 3006.

In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act. While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on

the basis of pregnancy. Pallas's complaint states a valid claim under Title VII.

For similar reasons, the district court erred in dismissing Pallas's claims under the California Fair Employment and Housing Act, Cal. Gov't. Code § 12900 *et seq.* The FEHA is based on Title VII, making it an unlawful business practice to "refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . . [t]o receive the same benefits or privileges of employment granted by that employer to other persons not so affected . . . including to take disability or sick leave. . . ." Cal. Gov't Code § 12945(b) (1) Because Pallas has stated a Title VII claim, she has also stated a claim under the FEHA.

Pallas has also stated a claim cognizable under ERISA. Pallas challenges the manner in which the Early Retirement Opportunity program was applied to her. Calculation of the service term for purposes of eligibility in the program is an act subject to review for breach of fiduciary duty. *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1502-03 (9th Cir. 1984). Pallas alleges that Pacific Bell breached its fiduciary duty by failing to act in the interests of plan participants. Discrimination constitutes a fiduciary breach for purposes of ERISA. *See, e.g., Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813, 104 S.Ct. 67, 78 L.Ed.2d 82 (1983). The allegations in the complaint are sufficient to support an ERISA claim.

The judgment of the district court is REVERSED and the case is REMANDED.

DUMBAULD, District Judge, dissenting:

Respectfully, and regretfully, I dissent. Appellant portrays to us, in the words of an English poet,

"a melancholy tale
Of things done long ago, and ill-done."¹

In my interpretation of Congressional legislation² and authoritative case law³ we confront a situation which we have no power to alleviate or remedy. The appellee telephone company has simply applied a seniority system,⁴ which it uses as the criterion for according many kinds of employee benefits, and appellant simply did not have enough seniority to qualify for the early retirement which she sought.

A seniority system is simply a method of record-keeping and mathematical calculation which determines how long an employee has worked for the employer. Economics has been called "the dismal science" and a rigorous economist might exclude all time not spent by

¹ From memory, I think John Ford was the author of these lines.

² See 42 U.S.C. 2000-e(k), 2000c-2(a) and 2000e-2(h), which will be discussed more fully hereinafter.

³ See *United Airlines v. Evans*, 348 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) and *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), which will be discussed more fully hereinafter.

⁴ Surviving from its predecessor company before the celebrated antitrust case resulting in the breakup of the old A.T. & T. system. See *U.S. v. Western Electric Co., et al.*, 552 F. Supp. 131 (D.D.C. 1982, *aff'd*. 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 492 (1983); further opinions in 569 F. Supp. 990 (1983), and 569 F. Supp. 1057 (1983).

the employee on actual productive work. Sound public policy and even corporate self-interest, however, surely permit the inclusion of time off work due to job-related injuries or unhealthful working conditions, or, indeed, any disease, disability, or other medical condition preventing the employee from performing his or her job in normal fashion. The telephone company's plan in the case at bar has always included medical leave but excluded personal leave in computing seniority.

The problem involved in the case at bar stems from the fact that up until legislation enacted by Congress in 1978⁵ the company counted pregnancy leave for women employees as personal leave, not as medical leave.⁶ Such action was then not unlawful. Upon enactment of the 1978 law the company began, and continues, to count pregnancy leave as medical leave.

The authoritative case law requires *current* unlawful discrimination in order to support a title VII violation. *Bazemore, supra*, upon which the majority relies, makes plain that "While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may

⁵ Act of October 31, 1978, 92 Stat. 2076, 42 U.S.C. 2000e-(k).

⁶ As explained in appellant's brief (p. 5):

At the time [of appellant's pregnancy in 1972], Pacific Telephone's policies required disabled pregnant employees to take personal leaves instead of disability leaves. Persons temporarily disabled for reasons other than pregnancy were given disability leaves while they were unable to work.

be imposed." 478 U.S. at 395, 106 S.Ct. at 3006. In *Bazemore* actual disparity between black and white employees with respect to pay continued to exist. In Justice Brennan's trenchant phrase, "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." In *Bazemore* there was a *current discrimination* being practiced.

In the case at bar, by contrast, all that the telephone company is currently doing is applying a bona fide seniority system, which is not discriminatory on its face, and is specifically authorized by Congress.⁷ Such current activity of the company, as previously stated, consists simply of examination of the company's records and adding up the time the employee has worked for the company, as disclosed by those records. Neither we nor the telephone company can erase or change history. We cannot, like the Communists' comical claims that they invented all useful inventions now in common use, alter or falsify the past. The company can say, with Pontius Pilate, "What I have written, I have written."⁸ Or, as eloquently stated in the familiar passage of the Rubaiyat:

⁷ See note 2, *supra*.

⁸ J.A.19:22. It is true that the company did adjust appellant's record to give her several more days (but not enough to qualify her for the early retirement she sought). I think this adjustment simply accepted her doctor's opinion of when she was able to return to work rather than the company doctor's. To contend that such an adjustment defeats the company's general reliance on its non-discriminatory seniority plan

(Continued on following page)

The Moving Finger writes; and, having writ,
 Moves on: nor all your Piety nor Wit shall lure it
 back to cancel half a Line, Nor all your Tears
 wash out a Word of it.⁹

Appellant's grievance is one that belongs to history; it is not a current violation of law.¹⁰ Currently there is no discrimination between pregnant and non-pregnant women, nor between pregnant women and men with a sex-specific ailment such as prostate condition (which was mentioned at argument), or men with other mutually

(Continued from previous page)

reminds me of those courts which in my law school days treated a special appearance to object to the jurisdiction of the court as constituting an acceptance of its jurisdiction over the merits of the case.

⁹ The Rubaiyat of Omar Khayyam (Fitzgerald, tr.) Stanza 71.

¹⁰ The situation in the case at bar can be illustrated by a hypothetical case. Suppose that appellant were a graduate of Harvard Law School, and that three years after women were first admitted to Harvard Law School, she sought election to the imaginary office of Historian of the Alumni Association, to be eligible for which post the by-laws for over a quarter of a century and without any specific sexual animus have provided that only alumni of five years' standing or more are eligible. (Assume *arguendo* also that such a requirement is reasonable (like minimum age for service in the Congress), and also that it would now be unlawful to exclude women from the School but was not prior to the year when they were first admitted during the deanship of Erwin Griswold]. Is it not plain that simply as a matter of chronology she would be ineligible for lack of the five years' standing required for election to that office?

available medical reasons for absence from work. Hence I would affirm on the Title VII claim.¹¹

I agree with the majority on the ERISA claim.

¹¹ As Judge Schroeder states, "the parties agree that the same legal analysis" applies to appellant's claims under California legislation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANA PALLAS,)	
Plaintiff-Appellant,	)	No. 90-15559
)	
v.	)	D.C. # CV-89-2373-DLJ
PACIFIC BELL; PACIFIC	)	(Northern California)
TELESIS, ET AL.,)	
Defendants-Appellees.	)	ORDER
)	
	)	(Filed Sept. 26, 1991)
_____)	

Before: SCHROEDER and FARRIS, Circuit Judges, and
DUMBAULD,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Edward Dumbauld, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANA PALLAS,	)	No. 90-15559
)	
Plaintiff/Appellant,	)	D.C. #
	)	CV-89-2373-DLJ
vs.)	
)	
PACIFIC BELL; PACIFIC	)	ORDER
TELESIS, et al.,)	
)	
Defendants/Appellees.	)	(Filed
_____	)	Oct. 10, 1991)

Before: SCHROEDER, Circuit Judge

Appellees' motion to stay the mandate is GRANTED.

APPENDIX D
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LANA PALLAS,)	
	)	C89-2373-DLJ
Plaintiff,)	
)	
v.	)	ORDER DISMISSING
	)	COMPLAINT
PACIFIC BELL et al.,)	
)	
Defendants.	)	(Filed Febr. 28, 1990)
<hr style="width: 45%; margin-left: 0;"/>)

The Court heard defendants' motions to dismiss under Rule 12 (b) (6) on December 13, 1989. Appearing for plaintiff were Shauna I. Marshall of Equal Rights Advocates and Robert Hirsch of Van Bourg, Weinberg, Roger & Rosenfeld. William Gaus of Pillsbury, Madison & Sutro appeared for defendants Pacific Bell and its related companies and pension plans. Jeffrey D. Wohl of Orrick, Herrington & Sutcliffe appeared for defendant American Telephone & Telegraph Company, Inc. ("AT&T").

After review of the briefs submitted by the parties, the oral argument of counsel, and the applicable legal standard, the Court hereby DISMISSES plaintiff's first and second claims for relief under the Civil Rights Act of 1964 and the California Fair Employment and Housing Act. Plaintiff's third claim for relief, under ERISA, 29 U.S.C. § 1104, is DISMISSED WITH LEAVE TO AMEND.

I. FACTS

Plaintiff seeks declaratory and injunctive relief and damages for defendants' failure to qualify her for an

Early Retirement Option ("ERO") benefit which was made available in 1987 to employees with 20 years or more Net Credited Service ("NCS"). Although plaintiff commenced employment with the predecessor of defendant Pacific Bell on or about December 20, 1967, she failed to qualify for the ERO because of a break in service in 1972 during which she was on leave due to pregnancy. At the time, her employer treated leaves for pregnancy as "personal leave" – which would not count as service toward retirement – rather than as "temporary disability leave" – which would count for seniority benefits such as retirement. Plaintiff received full credit for the periods both before and after her leave, but the actual time of leave taken was not included for calculating her service. Upon this basis, plaintiff was determined by her employer to lack three to four days of net service credit to qualify for the plan, and she was denied the ERO benefit.

The Complaint alleges that failure to reclassify plaintiff's 1972 pregnancy leave as disability leave for purposes of determining eligibility for the 1987 ERO benefit violates the Pregnancy Discrimination Act, 42 U.S.C. § 2000e (k) ("PDA"), or alternatively constitutes sex discrimination in violation of the Civil Rights Act of 1964 in that only women were denied the ERO benefit due to breaks in service for pregnancy leave which reduced their Net Credited Service. The Complaint alleges violations of the California Fair Employment and Housing Act, Cal. Gov't Code §§ 12940, 12945, in this same conduct. Finally, the Complaint alleges that the denial of the ERO benefit to plaintiff was determined in a manner violative of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq.

Defendants concede all the facts stated in the Complaint, and move for dismissal under Rule 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that these facts do not state a cause of action, either for sex or pregnancy discrimination or for violations of ERISA. In addition, defendant AT&T requests the Court to take judicial notice of a 1983 district court divestiture decree requiring that divested regional companies, including the other defendants in this action, take over complete responsibility for their pension plans. *United States v. Western Elec. Co., Inc.*, 569 F.Supp. 1057, 1093 (D.D.C. 1983). Based upon this decree, AT&T argues it is not a party to the 1987 conduct complained of and seeks dismissal as a defendant even were the Court to deny the Rule 12(b) (6) motion to dismiss.

II. DISCUSSION

A. Standard for Dismissal

The question presented by a motion to dismiss is not whether plaintiff will prevail in the action, but whether plaintiff is entitled to offer evidence in support of her claim. "[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless 'it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Conley v. Gibson*, 78 S.Ct. 99, 102 (1957). In the Ninth Circuit, the Court making this determination must assume that plaintiff's allegations are true, construe the complaint in a light most favorable to plaintiff, and resolve every doubt in plaintiff's favor. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

Therefore, the Court will dismiss the complaint or any claim in it without leave to amend only if "it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curiam)).

B. Claim for Relief Under Title VII

Prior to passage of the PDA, employer disability benefit plans which failed to cover pregnancy-related disabilities were not unlawful. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401 (1976). Congress overruled *Gilbert* in 1979, when the PDA amended the Civil Rights Act of 1964 to provide that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other person not so affected" 42 U.S.C. § 2000e(k). Plaintiff's counsel conceded at oral argument that plaintiff has not preserved any claim for discrimination from 1972 resulting from the failure to classify her leave as disability leave, even assuming that passage of the PDA would reinstate such a claim in 1979. Therefore, plaintiff's cause of action arises solely from post-1979 applications of her NCS without adjustment to credit the period of her 1972 pregnancy leave.

Plaintiff argues in the first instance that applying the NCS system without adjustment is facially discriminatory toward women because only women were denied service credits for periods of pregnancy leave. This, plaintiff claims, is the same as permitting NCS to accumulate for

women at a slower rate than it does for men. The Court is not persuaded by this argument.

A policy is facially neutral if it does not treat similarly situated employees differently based on the suspect criteria (here, pregnancy); this rule applies even though some basis for the neutral policy rests on a policy that now would be held discriminatory. *E.g., United Air Lines, Inc., v. Evans*, 97 S.Ct. 1885, 1889 (1977) (maintenance of a seniority system in which a woman was denied preference over subsequently-hired males was nondiscriminatory if she was also denied preference over subsequently-hired females). Under this rule, calculating plaintiff's service credit without adjustment for her pregnancy leave is facially neutral in that a woman who started work at the same time as plaintiff but took pregnancy leave after the policy was changed in 1979 would be eligible for the ERO while plaintiff would not.

Thus, the crucial factor contributing to a reduced NCS for plaintiff is not that she is a woman, or even that she took pregnancy leave, but that she took pregnancy leave at a certain time. This is not a case where, as described in *Lorance v. AT&T Technologies, Inc.*, 109 S.Ct. 2261, 2269 n.5 (1989), a woman is assigned half the seniority that a man receives for the same time worked. Here, for each credited day worked plaintiff received the same amount of seniority as other employees, male or female, and, after 1979, on pregnancy leave or not.

In view of this, the NCS system is facially neutral, and the parties agree that *Evans* provides the controlling law for a facially neutral system. In *Evans*, as here, the plaintiff asserted that her injury lay in the employer's

reliance upon an earlier act, lawful at the time but now discriminatory, to deny her seniority. The Court agreed that the earlier, discriminatory, system had a continuing impact on the plaintiff's pay and fringe benefits, but that this impact did not amount to a continuing violation of Title VII. *Id.* at 1889. The holding in *Evans* is precisely on point: the continuing impact of the earlier denial of service credit to plaintiff for the period of her pregnancy leave does not amount to a continuing violation of Title VII at the time that her NCS for retirement is actually calculated.

Plaintiff asks the Court to find the *Evans* rule as applied to this case modified by *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000 (1986). In *Bazemore* the Supreme Court held that an employer who paid disparate salaries to black and white employees prior to the passage of Title VII had a duty to eradicate salary disparities following passage of the Act. *Id.* at 386-87. The Court declines to read this rule in its broadest sense, as imposing an affirmative duty to eliminate all continuing impacts of prior discriminatory policies, no matter how incidental to the present benefit. *Bazemore* is clearly distinguishable from the present case in identifying the actionable wrong as "[e]ach week's paycheck that delivers less to a black than to a similarly situated white," *id.* at 395 (Brennan, J., concurring), i.e., each paycheck that was less than 100% of a white employee's salary. This is similar to the 50% seniority allocation identified as facially discriminatory in *Lorance*.

Plaintiff by contrast received 100% of her credited service for each day worked *before and after her pregnancy leave*. To adopt plaintiff's reasoning would require the

Court to consider that every day plaintiff accumulated service credits following her leave was a separate actionable wrong, because the total accumulated was less than it would have been had she received credit for her leave time. Such impact not only is lesser to begin with than a continuing salary disparity, it diminishes over time as leave accumulates at the full rate.

Therefore, application of plaintiff's NCS based in part upon the denial of service credit for her pregnancy leave does not state a cause of action under Title VII, and plaintiff's First Claim for Relief is DISMISSED.

C. California Fair Employment and Housing Act

California's Fair Employment and Housing Act, Gov't Code § 12900 *et seq.*, contains a provision parallel to that in the PDA, making it an unlawful business practice to "refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . . [t]o receive the same benefits or privileges of employment granted by that employer to other persons not so affected . . . including to take disability or sick leave . . ." Cal. Gov't Code § 12945(b) (1). This provision is clearly modeled on the PDA, as it was adopted in 1980.

Therefore, the *Evans* analysis for continuing violations of Title VII applies to the FEHA claim as well, and the Court finds no continuing violation of FEHA in refusing to grant plaintiff credit for pregnancy leave taken before passage of the Act.

Further, any state law claim for discrimination beyond the scope of Title VII would be preempted by

ERISA under the rule in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983). There the Supreme Court specifically found that state antidiscrimination statutes mandating disability benefits for pregnancy beyond the scope of prohibited practices under Title VII are preempted by ERISA, while state statutes which parallel Title VII are not. This is so because state anti-discrimination provisions within the scope of Title VII were subject to the savings clause of ERISA § 514(a), 29 U.S.C. § 1144(a). *Id.* However, where state law prohibits practices which Title VII holds lawful, such law is not subject to the savings clause, and is preempted by ERISA. *Id.* at 2903.

For these reasons, plaintiff's Second Claim for Relief, under the California Fair Employment and Housing Act, is DISMISSED.

D. Improper Administration of Claim – ERISA

Plaintiff has identified a colorable claim for improper administration of her application for the ERO benefit in violation of ERISA. Defendants argue persuasively that the policy of calculating NCS without making an adjustment for pre-1979 pregnancy leave does not state a claim under ERISA.

However, plaintiff has identified two alternative methods of determining eligibility for the ERO benefit, as described in the ERO amendment to the Plan. *See Addendum to Pacific Telesis Group Pension Plan for Salaried Employees for 1987 Window Period Retirements ("ERO Plan")*. Specifically, the benefit was apparently available to employees whose service as adjusted amounted to 20

years, or to employees whose "unadjusted term of employment" on December 31, 1987, would amount to 20 years. Because plaintiff commenced her employment with defendants on December 20, 1967, it appears from the face of the ERO Plan that she might have been eligible for the ERO benefit under this second criteria. In addition, the term "Net Credited Service," on which defendants rely to justify their denial of the ERO benefit to plaintiff, is not defined in the ERO Plan.

Therefore, an ambiguity exists on the face of the ERO Plan, and plaintiff may be able to state a claim for improper administration of her application for benefits. However, the Complaint in its present form fails to allege facts sufficient to state a claim based on administrative conduct. Although defendants assert that the plan provides the administrator with complete discretion and that they could, therefore, survive a challenge based on the "arbitrary and capricious" standard, it is appropriate at this time to permit plaintiff to state such a claim, if she can.

The Court notes that, in order to retain AT&T as a defendant, the amended complaint must articulate a ground for AT&T's continuing administrative capacity in regard to the ERO Plan following the 1983 divestiture of Pacific Bell and other subsidiaries. *See United States v. Western Elec. Co., Inc.*, 569 F.Supp. 1057, 1093 (D.D.C. 1983).

Therefore, plaintiff's Third Claim for Relief is DISMISSED WITH LEAVE TO AMEND to state facts sufficient to allege administrative conduct in violation of ERISA.

III. CONCLUSION

For the reasons stated above, the Court rules as follows:

1. Plaintiff's first claim for relief for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, is DISMISSED WITH PREJUDICE.

2. Plaintiff's second claim for relief for discrimination under the California Fair Employment and Housing Act, Calif. Gov't Code § 12900 *et seq.* is DISMISSED WITH PREJUDICE.

3. Plaintiff's third claim for relief under ERISA § 404, 29 U.S.C. § 1104, is DISMISSED WITH LEAVE TO AMEND to allege facts supporting a claim for improper administration of her application for benefits and to articulate the ground, if any, upon which defendant AT&T retained administrative authority at the time plaintiff's claim was decided.

Plaintiff has 30 days from the filing date of this Order to file her amended complaint. A status conference is set in this matter for May 2, 1990, at 9:00 a.m.

IT IS SO ORDERED.

DATED: February 28, 1990.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX E

29 USC § 1104 provides in pertinent part:

(a) (1) Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.¹

¹ Subsequent to events and actions at issue in this case, 29 U.S.C. § 1104 (a) (1) (D) was amended. The amendment was effective September 30, 1990. That section now reads:

"in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter *and* subchapter III of this chapter."
(Underscore reflects amendment.)

DEC 18 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PACIFIC BELL, PACIFIC TELESIS GROUP,
PACIFIC TELEPHONE & TELEGRAPH COMPANY,
PACIFIC TELESIS GROUP PENSION PLAN FOR
SALARIED EMPLOYEES,

Petitioners,

v.

LANA PALLAS (aka LANA HUBBS),
and persons similarly situated,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

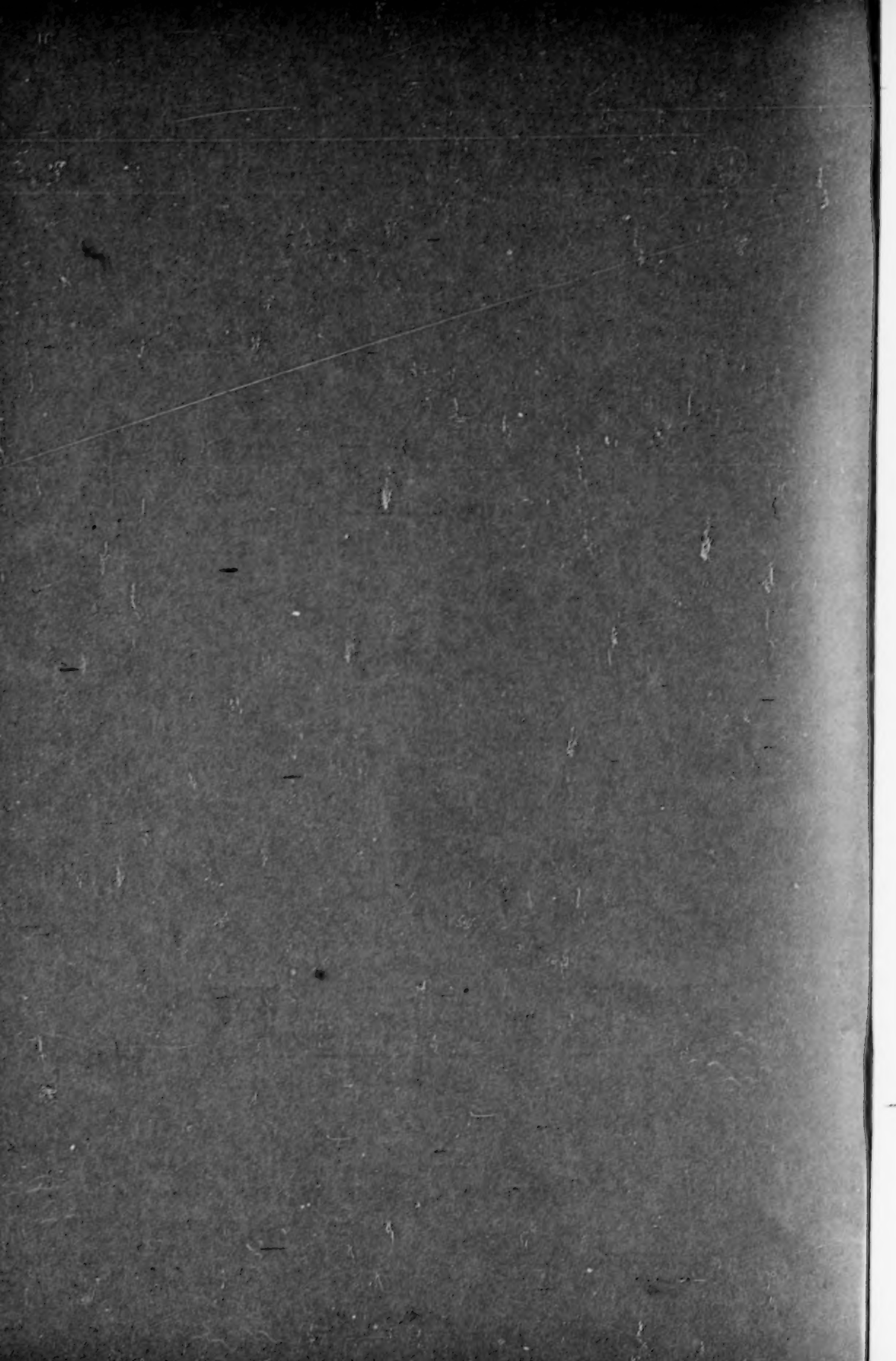
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QUESTIONS PRESENTED

1. Does an employee state a valid claim of pregnancy discrimination under Title VII, as amended prior to 1991, by alleging that her employer denied her pension benefits in 1987 under a service crediting system which excluded all pregnancy leaves taken prior to 1979 but included all other temporary disability leaves taken during the same time period? -

2. Does a pension plan participant state a valid claim for breach of fiduciary duty under ERISA by alleging that the pension plan sponsor wrongfully excluded part of her 1972 pregnancy disability leave in calculating her eligibility for pension benefits?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-812

PACIFIC BELL, PACIFIC TELESIS GROUP,
PACIFIC TELEPHONE & TELEGRAPH COMPANY,
PACIFIC TELESIS GROUP PENSION PLAN FOR
SALARIED EMPLOYEES,

Petitioners,
v.

LANA PALLAS (aka LANA HUBBS),
and persons similarly situated,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

STATUTES INVOLVED

This case involves Section 701(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(k), which provides, in pertinent part:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt

of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

* * *

This case also involves Sections 404 and 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1104(a)(1), 1132(a)(1), (3), which are set out in the Appendix. App. at 1a-2a. Relevant to the issue of granting certiorari is Section 112 of the Civil Rights Act of 1991, 102 Pub.L. No. 166, § 112 (1991), which is set out in the Appendix. App. at 3a.

STATEMENT OF THE CASE

A. Nature of the Case

Pacific Bell¹ came into existence as a new business entity and employer in 1984, as a result of the court-ordered breakup of American Telephone and Telegraph Company. As a newly established company, Pacific Bell created various and numerous personnel policies, including policies for calculating employees' service credit. It also established new pension plans with corresponding eligibility criteria.²

¹ Petitioners Pacific Bell, Pacific Telesis Group, and Pacific Telephone & Telegraph Company are employers and petitioner Pacific Telesis Group Pension Plan for Salaried Employees is an employee pension benefit plan. For ease of reference, petitioners are referred to collectively as "PacBell" herein. Petitioner Pacific Bell, which came into existence in 1984, is a subsidiary of petitioner Pacific Telesis Group; the term "Pacific Bell" is used throughout this brief to refer to those two petitioners.

² In analyzing the effect of the divestiture on existing pension plans, the court found that divestiture required the establishment of new pension plans by the divested regional companies. It noted that the decree did not set out rules for how the new post-divestiture pension plans should determine when an employees' pension rights become vested. *United States v. Western Electric Co.*, 569 F. Supp. 1057, 1094 n. 160 (D.D.C. 1983).

This lawsuit challenges PacBell's decision to deny Lana Pallas pension benefits under an Early Retirement Opportunity offered to management employees in 1987. It is undisputed in this lawsuit that Pallas was denied this new benefit because under PacBell's service crediting policies, employees disabled by pregnancy prior to 1979 do not receive service credit towards their pension eligibility for their pregnancy-related leaves. It is also undisputed that PacBell does credit towards pension eligibility all other temporary disability leaves for the same pre-1979 period. It is this facially discriminatory treatment of pregnancy by PacBell which the court of appeals concluded violated Title VII, as amended by the Pregnancy Discrimination Act of 1978, California's Fair Employment and Housing Act, and the Employee Retirement Income Security Act.³

Pallas has worked for petitioner Pacific Bell and its predecessor companies, Pacific Telephone and Telegraph Co. ("Pacific Telephone") and American Telephone and Telegraph Co. ("AT&T"), since 1967. In 1972, Pallas became pregnant and was forced by her then employer, Pacific Telephone, to take a personal leave of absence during her period of disability, rather than a disability leave. Pallas' personnel records, including doctors' notes, clearly indicate that her absence was due to medical reasons. Pacific Telephone's "Net Credited Service" policies granted employees service credit for disability leaves, but did not grant service credit for personal leaves.

In 1987, Pacific Bell, Pallas' new employer, announced a new, one-time only, benefit for managerial, non-union employees, called an Early Retirement Opportunity

³ Title VII was most recently amended in 1991. This lawsuit was filed and the decisions below were issued before the 1991 amendment was enacted. Upon remand to the district court it is unclear whether the trial court will apply the Civil Rights Act of 1991 to this case.

("ERO"). Under the terms of this new pension plan, a managerial employee would be eligible for an early retirement benefit if her "unadjusted term of employment is 20 years or more on or before December 31, 1987" By notice to its managerial employees, Pacific Bell explained that such employees would be eligible for this new benefit if their "actual term of employment, or Net Credited Service (NCS), will be 20 years or more on or before your retirement date (December 31, 1987 or prior)."

In 1987, Pallas applied for retirement under the ERO, but PacBell determined that she was ineligible because she did not have the requisite 20 years of service. PacBell did not base its determination on Pallas' "unadjusted" or "actual" term of employment. Instead, PacBell based her ineligibility upon their calculation of her net credited service. In that calculation, PacBell refused to credit Pallas' 1972 pregnancy disability leave toward the ERO. PacBell, however, gave service credit towards ERO eligibility for all other pre-1979 absences due to temporary medical disabilities. It is PacBell's policy to exclude from the net credited service calculation all pre-Pregnancy Discrimination Act pregnancy disability leaves.

After the initial determination that she was ineligible for the ERO, Pallas followed Pacific Bell's internal review procedures and obtained a re-calculation of her service credit for purposes of ERO eligibility. Pacific Bell's Employees' Benefits Claims Review Committee reviewed Pallas' records and adjusted her Net Credited Service date to give her service credit for some, but not all, of her pregnancy disability leave. By letter dated October 11, 1988, Pacific Bell informed Pallas that it had made a final determination that she was ineligible for the 20-year plan retirement option, by three to four days of service credit. On or about December 16, 1988, Pallas filed a charge of discrimination with the United States Equal Employment Opportunity Commission.

B. Proceedings Below

Pallas filed a class action complaint, alleging that PacBell's net credit service system used to calculate eligibility for the ERO and other benefits is facially discriminatory because it does not credit pregnancy leaves taken prior to 1979 but credits all other temporary disability leaves taken during the same period. The complaint was brought under Title VII, as amended prior to 1991, and California's FEHA. Additionally, Pallas alleges that PacBell's interpretation and application of the ERO violates ERISA.

PacBell moved for dismissal of the entire complaint, for failure to state a claim. The district court ruled that Pallas had not stated a valid claim for discrimination under Title VII or the FEHA and dismissed both claims with prejudice. The district court dismissed the ERISA claim, although it granted Pallas leave to amend to allege facts supporting a claim for improper administration of benefits under ERISA. Pallas filed an Application For Entry of Judgment declining the court's leave to amend on the grounds that her complaint as framed properly alleged a claim for relief under ERISA and timely appealed the judgment entered by the district court.

The Ninth Circuit Court of Appeals unanimously reversed the district court as to its dismissal of Pallas' ERISA cause of action.⁴ The panel split on the Title VII issue, with Circuit Judges Mary M. Schroeder and Jerome Farris voting to reverse the district court's dismissal of the Title VII claim and District Judge Edward Dumbauld voting to affirm. The court of appeals remanded this case to the district court, where, prior to the motion for dismissal, only limited discovery had begun. PacBell's request for a rehearing and suggestion for a rehearing en banc were denied. After the Ninth Circuit issued its

⁴ Petitioners inaccurately state that "[a] divided panel of the Ninth Circuit reversed." Petition at 6.

decision, Title VII was amended by enactment of the Civil Rights Act of 1991.

REASONS FOR DENYING THE WRIT

This Court should not exercise its discretion to grant the petition filed in this case. PacBell's claim that the decision of the Court of Appeals for the Ninth Circuit will have unprecedented and far-reaching consequences beyond the facts and parties to this case is not supported by the decision itself, the facts of this case, or the current state of Title VII law.

The facts of this case, involving a pension benefit which PacBell offered to its managerial employees in 1987, do not present a challenge to a "competitive status" seniority system and the Ninth Circuit's decision in this case will not affect employers' ability to use existing competitive seniority systems to determine such matters as promotions, transfers, and shift assignments. The decision does not prevent PacBell from using a service crediting system nor require it to eliminate any and all possible discriminatory effects of such a system. Moreover, this case does not challenge a pension plan arrived at through the collective bargaining process; thus any remedy for the Title VII violation will not affect the contractual expectations of workers against whom discrimination did not occur. Compliance with the court of appeals' decision will simply mean that PacBell has to grant service credit, for purposes of benefits, to employees for absences from work due to pregnancy disability which occurred prior to 1979.

In deciding future Title VII cases involving discriminatory seniority or crediting systems, courts and employers will look not to the court of appeals' decision in this case, but to Section 112 of the Civil Rights Act of 1991, which specifically amends Title VII to expand the right to challenge discriminatory seniority systems. At the time of

the lower courts' decisions in this case, the Civil Rights Act of 1991 had not been enacted and therefore its application to this case was not analyzed by the lower courts.

The court of appeals' decision here comports with this Court's long line of decisions holding that Section 703(h) of the Civil Rights Act of 1964 does not apply to facially discriminatory crediting or seniority systems. Contrary to PacBell's assertion, the court of appeals did not overlook the importance and significance of Section 703(h) in its decision. Neither did it engage in a "novel and restrictive" interpretation of Section 703(h) which warrants review by this Court. Rather, the court of appeals found that Section 703(h) of Title VII did not apply to PacBell's net credited service system because the crediting system was not a neutral system being challenged because of its discriminatory effects, but rather the system itself was facially discriminatory. It is that finding of facial discrimination that precludes the application of Section 703(h) to this case, not a misreading of the Title VII's seniority provision. As this Court decided in *Bazemore v. Friday*, 478 U.S. 385 (1986), an employment policy which currently treats similarly situated persons in a protected class differently violates Title VII, even if the treatment is the continuation of a policy that was instituted by the employer at a time when it was legal. There is no split among the Circuits on the issue of the applicability of *Bazemore* to facially discriminatory employment policies of this nature.

For Pallas' ERISA cause of action, PacBell's interpretation and application of the pension plan with regard to Pallas' retirement application must be reviewed under ERISA's fiduciary standards, pursuant to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The Ninth Circuit Court of Appeals correctly recognized that Pallas challenged the employer's

interpretation and application of the pension plan, not the employer's decision to adopt it. The court of appeals decision below comports with *Firestone*, and does not tread upon any other circuit court decision sanctioning an employer's decision to create, amend or terminate a benefit plan.

I. FUTURE TITLE VII CASES INVOLVING SENIORITY SYSTEMS WILL BE BASED ON INTERPRETATION OF THE RECENTLY ENACTED CIVIL RIGHTS ACT OF 1991, NOT INTERPRETATION OF THE PRE-ACT COURT OF APPEALS DECISION IN THIS CASE.

Before discussing the arguments raised on the merits by petitioners, Pallas first takes issue with PacBell's statement that grant of certiorari to review the decision of the Ninth Circuit is important in this case because the "decision is of immense practical and legal importance not only for petitioners, but for all employers." Petition at 9. In fact, the reality is that whatever the import of the appellate court's decision to the parties to this litigation, Congress' recent amendment of Title VII through the Civil Rights Act of 1991 ("the 1991 Act") has significantly reduced, if not eliminated, the importance of the Ninth Circuit's decision for future Title VII seniority cases.

Two issues lie at the heart of this case and were central to the Ninth Circuit's analysis: (1) whether PacBell's seniority or service crediting system is "facially neutral" and (2) what constitutes a timely challenge to a seniority or service crediting system which from its inception overtly discriminates against pregnancy. Both of these questions are addressed by the 1991 Act which will be the basis for future Title VII cases which challenge longstanding discriminatory seniority systems. The issue of facial versus nonfacial discrimination is rendered moot

by the 1991 Act which makes all intentionally discriminatory seniority systems subject to challenge at any time, whether or not the discriminatory purpose is apparent on the face of the seniority provision.⁵ 102 Pub. L. No. 166, § 112 (1991). The court below had to reach the issue of facial discrimination because this Court has held that facially neutral seniority systems cannot be challenged under Title VII even if they were adopted with a discriminatory purpose. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

Similarly, the second issue, *i.e.*, what constitutes a timely challenge to an intentionally discriminatory seniority system, though once a burning issue, is now well-settled by the 1991 Act. Now, one aggrieved by such a system may challenge it at the time the system is adopted, at the time the individual becomes subject to the system, or when the person aggrieved is injured by the application of the system. 102 Pub. L. No. 166, § 112.

The litigation below was addressed to Title VII as it existed prior to the recent Congressional amendments. The impact of the Ninth Circuit's decision is, consequently, limited to the interpretation of a statute which no longer exists in its prior form. As such, it is of only "isolated significance." *See, e.g., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76 (1955). Contrary to the scenario outlined by PacBell,⁶ future

⁵ Appellants misstate the facts when they say that "there is no claim that Pacific Bell's long-standing seniority system was 'adopted for an intentionally discriminatory purpose.'" Petition at n. 5. It is precisely Pallas' claim that the crediting system at issue in this case not only treats pregnant women differently than similarly situated men, but that these practices and policies "were intentionally designed to discriminate against pregnant women." First Amended Complaint, ¶ 62. The allegations of the complaint are, therefore, squarely within the ambit of the new Act.

⁶ Although PacBell claims "the will of Congress will [be] frustrated" if employers are forced to review their seniority systems

litigants will be guided, not by this decision, but by new decisional law which will arise to interpret the 1991 Act.

Given these facts, it is clear that the Court's review of this case would present no benefit beyond the particular parties. This Court's consistent position has been that it will not "grant[] the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Moreover, it is unclear what value Supreme Court review would have even for the litigants in the present case. The Ninth Circuit has ordered this case remanded; on remand, the district court will be able to determine, among other things, the impact of the 1991 Act on the present case. At least one district court decision has already held the 1991 Act to be retroactive to pending cases. See *Mojica v. Gannett Company, Inc.*, No. 90C3827 (N.D. Ill., Nov. 27, 1991) (order granting leave to amend complaint and finding Civil Rights Act of 1991 applicable to plaintiff's claims). Certainly it is not appropriate for the Supreme Court to grant review at this stage in order to determine the question of the retroactivity of the 1991 Act to this case, before the Court of Appeals has ruled

to determine if they are the product of discriminatory treatment, this is exactly the effect of the 1991 Act. By specifically permitting employees to challenge intentionally discriminatory seniority systems at the time they are applied, Congress clearly intended that employers should bear the burden of eliminating intentional discrimination even when it involves seniority systems. The Ninth Circuit's interpretation of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, is, therefore, in accord with clear congressional intent as expressed in the 1991 Act.

on the Act or its complex legislative history. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 547 (1978).⁷

Finally, it is important to recognize the procedural posture of this case. The original appeal was from the grant of a motion to dismiss. The effect of the Ninth Circuit's ruling, therefore, is merely to remand the case to the District Court for a trial on the merits. Certainly a myriad of questions remain to be resolved in that forum, not the least of these being the effect of the 1991 Act on this action. Neither the interests of the parties nor principles of importance to the public justify review by this Court at this early phase of the case.

II. THE COURT OF APPEALS CONSIDERED THE LANGUAGE AND INTENT OF SECTION 703(h) AND CORRECTLY DECIDED THAT IT DID NOT APPLY TO A FACIALLY DISCRIMINATORY SERVICE CREDITING SYSTEM THAT TREATED PREGNANCY DISABILITY LEAVES DIFFERENTLY THAN ALL OTHER SIMILARLY SITUATED DISABILITIES FOR PURPOSES OF BENEFITS.

A. PacBell's Service Crediting Policies Are Facially Discriminatory Under Title VII Because They Credit Pregnancy Disability Leaves Differently Than Other Temporary Medical Disability Leaves for Purposes of Receipt of Fringe Benefits.

The court below did not, as PacBell asserts as the basis for its writ, overlook Section 703(h) of Title VII and its protection of neutral seniority systems. The court of appeals specifically held that the district court erred in relying on Section 703(h) because PacBell's crediting policies were facially discriminatory. Petition, App. at 5a. Based on its review of the allegations in Pallas' complaint, the court concluded that this case

⁷ Moreover, even if the 1991 Act is not retroactively applied in this case, PacBell must evaluate its service crediting policies in light of the new Act. PacBell continues to offer new retirement plans which calculate eligibility based on the policies at issue here.

is not a belated attempt to litigate the discriminatory impact of a pre-Pregnancy Discrimination Act program. Pallas challenges the criteria adopted in 1987 to determine eligibility for the new benefit program. The claim could not have been brought earlier. Second, the net credit system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral.

Petition, App. at 5a-6a.

In enacting the Pregnancy Discrimination Act ("PDA"), which amended Title VII, Congress overturned the holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, this Court upheld a disability plan which provided medical coverage for non-occupational accidents and sicknesses but excluded coverage for disabilities arising out of pregnancy. This Court reasoned in *Gilbert* that the plan's failure to cover pregnancy did not constitute discrimination against women, because some women employees did receive medical coverage for non-pregnancy disabilities.

The Pregnancy Discrimination Act changed the male-female comparison made in *Gilbert* and established the group with which pregnant workers should be compared to determine whether or not discrimination has occurred. The key to a discrimination analysis under the PDA is to compare the treatment of pregnancy disabilities with the treatment of other temporary medical disabilities. See 42 U.S.C. § 2000e(k). In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), this Court interpreted the language of the PDA for the first time and concluded that a benefits plan was facially discriminatory because it treated pregnancy-related conditions less favorably than other medical conditions for purposes of receipt of benefits.

Under the plain language of the PDA and this Court's holding in *Newport News*, PacBell's policy for calculating pension credit is facially discriminatory. PacBell does not

credit towards pension eligibility, in this case for the Early Retirement Opportunity, pre-1979 absences due to pregnancy disability but does credit pre-1979 absences due to all other temporary medical disabilities. PacBell's exclusion of pre-1979 pregnancy disability absences when awarding benefits is precisely the sort of policy which the Pregnancy Discrimination Act set out to correct. The PDA states that women "affected by pregnancy childbirth, or related medical conditions shall be treated the same for . . . receipt of fringe benefits[]" as other persons not so affected but similar in their ability or inability to work" 42 U.S.C. § 2000e(k) (emphasis added). In the instant case, all the employees absent due to temporary medical disabilities prior to 1979 were similar in their inability to work, yet PacBell does not treat them the same purposes of receiving pension benefits.

PacBell argues that its pension plans do not discriminate against pregnancy because they are merely based on an employee's years of service and do not specifically mention pregnancy. Put differently, PacBell is arguing that seniority and seniority "dates" are inherently neutral. However, an employer's benefits policies are not automatically neutral simply because they base eligibility on a numerical Net Credited Service date. For purposes of a discrimination analysis, the relevant determination is *how* a number is arrived at, *i.e.*, the criteria for deciding what absences or breaks will be credited towards the Net Credited Service date. See, *e.g.*, *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1080-82 (1983); *Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 716 (1978) (holding in part that the fact that female employees' contributions towards a pension plan were based on longevity statistics did not make the plan gender neutral). In the instant case, PacBell's criteria is to credit all pre-1979 disability absences except pregnancy when computing an employee's Net Credited Service ("NCS") date.

In a strikingly similar case, *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), a company's employees could not receive severance pay if they were eligible for retirement. Borden defended itself against claims of age discrimination by arguing that its severance pay policy was neutral because it distinguished among employees on the basis of retirement status, not age. The court of appeals looked behind the "neutral" retirement status and found that Borden's policy actually discriminated on the basis of age. As in this Court's decision in *Johnson Controls*, the Ninth Circuit went on to hold that facially discriminatory practices constitute intentional discrimination regardless of the subjective motivation behind their establishment. 724 F.2d at 1393. See also *International Union, et al. v. Johnson Controls*, — U.S. —, 111 S. Ct. 1196, 1203-04 (1991).

PacBell's actions when it denied Pallas' application for the Early Retirement Opportunity ("ERO") further demonstrate that plan eligibility was not based on an immutable neutral number representing years of service. The ERO plan document states that an employee is eligible for an early retirement opportunity if her "unadjusted term of employment is 20 years or more on or before December 31, 1987." In spite of that language, PacBell chose to adjust Pallas' term of employment to exclude her 1972 pregnancy leave but it did not adjust other ERO applicants' terms of employment to exclude their disability leaves from the same period. Moreover, the fact that PacBell re-calculated Pallas' NCS to credit some of her 1972 disability leave is further evidence that the ERO did not simply rely on a "permanent part of the employee's work history." Petition at 8. In 1987, Pac-Bel made decisions about including or excluding Pallas' 1972 pregnancy-based absence.

It should be noted that Pacific Bell came into existence as a new business entity and employer in or around 1984 when AT&T was divested of its regional operating com-

panies. At that point it established its own pension and benefit policies. See *United States v. American Tel & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd.*, 460 U.S. 1001 (1983). When it formed, Pacific Bell drew up criteria for what service would count towards an employee's Net Credited Service date and its pension plans. Pacific Bell then instituted a policy which allowed former employees of its predecessor companies credit for pre-Pacific Bell Service, including periods of leave due to temporary disability, but excluded from that credit all pre-1979 leaves due to pregnancy disability. Pacific Bell was under no obligation to continue the distinction created by Pacific Telephone between pre-1979 pregnancy disability leaves and other pre-1979 temporary disability leaves for purposes of pension benefits.

In fact, the EEOC regulations in effect at the time Pacific Bell established its pension policies in 1984 *required* Pacific Bell to treat pregnancy disability absences the same as other pre-1979 disability absences. The EEOC regulations state in relevant part:

(b) . . . Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extension, the *accrual* of seniority and other benefits and privileges . . . shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities.

* * *

(d) (2) Any fringe benefit program *implemented after October 31, 1978* must comply with the provisions of Section 1604.10(b) upon implementation.

29 C.F.R. Section 1604.10 (1990) (emphasis added). Thus when the company was formed, Pacific Bell was legally obligated to credit all temporary disability leaves equally towards its fringe benefit programs.

B. Section 703(h) Only Exempts Neutral Seniority Systems From The Reach of Title VII.

PacBell argues that this Court should grant its petition because the Ninth Circuit's decision represents a radical and disruptive departure from this Court's established Title VII analysis of Section 703(h) seniority cases. In reality, the court of appeals followed this Court's line of cases applying 703(h) when it concluded that Section 703(h) was not applicable to this case because PacBell's crediting policies facially discriminated against pregnancy. Moreover, because the seniority system at issue here involves what this Court has defined as a "benefits" seniority system rather than a "competitive status" seniority system, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976), the decision of the court below does not "frustrate the valid reliance interests of other employees regarding such matters as job assignments, work schedules, promotions and layoffs that Congress intended to protect." See Petition at 10-11.

Two central holdings emerge from this Court's 703(h) cases. One, neutral seniority systems that treat similarly situated persons the same cannot be challenged under Title VII merely because they have a discriminatory adverse impact, i.e., they are neutral but their use nonetheless has a discriminatory effect. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Two, facially discriminatory seniority systems can be challenged at any time, regardless of how long they have been in place. *Lorance*, 490 U.S. at —, 109 S.Ct. at 2269; *Evans*, 431 U.S. at 560.⁸

⁸ Neutral seniority systems can also violate Title VII if they are not bona fide systems. See 42 U.S.C. § 2000e-2(h). Whether a seniority system is "bona fide" is a question of fact. See, e.g., *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 279-81 (1982). Moreover, under the Civil Rights Act of 1991, sen-

In all of the above Title VII seniority cases, the plaintiffs conceded that their employers' seniority systems were race and gender neutral. Unlike Pallas here, they did not challenge the process and criteria for determining an employee's length of service, or any of the components of the seniority systems. Put simply, they did not challenge the seniority systems themselves. What the plaintiffs in those cases did argue was that, for historical reasons, the *application* of the neutral seniority systems had a negative effect upon the class members.

In *Teamsters*, the defendant's seniority system for purposes of job bidding and layoff protection took into account only the amount of time an employee had been in a bargaining unit. This policy was the same for black, white and Hispanic employees. Plaintiffs conceded that the seniority system was not facially discriminatory. 431 U.S. at 356. Instead, plaintiffs alleged that bargaining unit seniority was discriminatory because it had the effect of locking minority employees into inferior jobs by discouraging transfers to better jobs that had previously been all white.

Evans involved a challenge to United Air Lines' policy of refusing prior service credit to all employees who came back after a break in service. The plaintiff in *Evans* had been forced to resign from United Air Lines because she had married. When she returned to work for United in 1972 she did not receive credit for any prior service. This Court found that the complaint did not state a present violation of Title VII, because the plaintiff had not alleged that the seniority system treated male former employees differently than female former employees. Thus, the seniority system was neutral because it treated similarly situated males and females the same. Pallas' case would be like *Evans* if PacBell's service credit system did

iority systems which have been adopted for an intentionally discriminatory purpose can be challenged at any time. 102 Pub. L. No. 166, § 112 (1991).

not give service credit for *any* pre-1979 medical disability absences and yet Pallas was challenging the effect of that system.

In *Patterson* and *Lorance*, the plaintiffs also conceded that the seniority systems were neutral, and as in *Teamsters*, they argued that the policies requiring a forfeiture of department seniority upon transferring to another department had the effect of discouraging them from transferring into previously segregated, higher paying departments. Whites and men, respectively, who sought to transfer to other departments also faced the same forfeiture obstacle. Additionally, in *Lorance* some of the plaintiffs also challenged their layoffs as the discriminatory effect of the forfeiture policy which had reduced their seniority.

If the seniority systems described above had been found to discriminate against the plaintiffs under a Title VII adverse impact theory, any remedy would have entailed changing the competitive seniority dates for all the employees in order to eliminate the discriminatory effects. This is the result that the drafters of Section 703(h) intended to preclude and therefore in the cases cited above, this Court concluded that the policies underlying Section 703(h) did not allow adverse impact, *Griggs*-type challenges to neutral seniority systems.

As implied above, another crucial distinction between the above line of Section 703(h) cases and this case is that the instant case does not involve a challenge to a "competitive status" seniority system. Pallas is contesting the way "benefits" seniority is calculated. The seniority at issue here does not determine bidding rights for transfers, promotions, schedules, or order in line for layoffs. In *Franks*, this Court meticulously distinguished between "benefits" seniority like that involved in this case, which does not affect bidding rights, and "competitive status" seniority, which does. "Competitive status" seniority is fundamentally different from "benefits" seniority because

it determines the allocation of scarce resources. 424 U.S. at 766. The implication of the distinction drawn in *Franks* and the other Section 703(h) cases, which all involved competitive seniority systems established by a collective bargaining agreement, is that 703(h) was meant to protect valuable "indefeasibly vested rights conferred by the employment contract." 424 U.S. at 778.⁹

Unlike the dramatic impact of altering a competitive seniority system, if PacBell credits Pallas' 1972 disability leave towards her Net Credited Service date, other employees' entitlement to pension benefits will not be affected in any way. Therefore, this case does not have the sweeping implications for nationwide seniority systems that PacBell would have this Court believe it does and its review by this Court is not necessary or warranted.¹⁰

⁹ Petitioners cite extensively from *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), in support of their argument that 703(h) was meant to bar claims such as Ms. Pallas'. However, *Franks* did not involve a challenge to a seniority system and its result is not even close to being at odds with that of the court of appeals in this case. The issue in *Franks* was whether Section 703(h) prohibited the award of retroactive seniority to identifiable victims of *hiring* discrimination. This Court concluded that 703(h) allowed for retroactive seniority after a lengthy exploration of the tension between protecting the legitimate, contractual expectations of the innocent workers and Title VII's make-whole remedies for victims of discrimination. It is this discussion which petitioners allude to in their argument that this case involves a challenge to "perpetuation" of the effects of past acts, which is barred by 703(h). See Petition at 9.

¹⁰ The plain language of the Pregnancy Discrimination Act provides an additional ground for upholding the decision of the court of appeals. The PDA explicitly limits the special status accorded to bona fide seniority systems under 42 U.S.C. § 2000e-2(h). The Pregnancy Discrimination Act reads, in pertinent part:

[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their

C. The Court of Appeals Correctly Applied This Court's Decision In *Bazemore v. Friday* When It Held That PacBell's Policy of Refusing To Credit Pre-PDA Pregnancy Leaves Was A Current Discriminatory Practice.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), the plaintiffs sued under Title VII to eliminate salary disparities between similarly situated black and white employees. In the same way that PacBell's service crediting policy does not mention pregnancy, the employer's pay policies in *Bazemore* did not explicitly state that whites would be paid more than blacks. Instead, the disparities stemmed from the fact that prior to 1965, the employer's work force was divided into a "white branch" and a "black branch" with black employees being paid less than white employees. 478 U.S. at 394. The two branches were merged in August 1965 and salary adjustments were made, but disparity between the salaries of black and white employees persisted.

Like PacBell here, the court of appeals in *Bazemore* reasoned that defendant's current policies were facially

ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. [emphasis added]

The Pregnancy Discrimination Act is unique in specifically limiting the applicability of Section 2000e-2(h), including its seniority provisions. Compare 42 U.S.C. § 2000e(k), with, 42 U.S.C. § 2000e-2. Congress drafted and enacted the Pregnancy Discrimination Act fourteen years after it enacted Section 2000e-2(h), and thus the clear language of the PDA exempts it from the reach of Section 2000e-2(h)'s language "[n]otwithstanding any other provision of this subchapter." "As is true in every case involving the construction of a statute, [the court's] starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Here, the language of Section 2000e(k) clearly states that "nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise." Thus, under the plain language of the Pregnancy Discrimination Act, the "special treatment" accorded bona fide seniority systems is not applicable in the context of a claim of pregnancy discrimination.

neutral, thus it had no duty to eradicate any salary disparities between similarly situated employees that were established before the date that Title VII made those disparities illegal. This Court concluded that the pay scales were not neutral because similarly situated employees were *currently* being treated differently and stated,

[t]hat the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension became covered by Title VII Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that pre-Act discriminatory differences in salaries did not have to be eliminated.

Bazemore v. Friday, 478 U.S. at 395-96 (emphasis in original).

Similarly, PacBell's present system for calculating Net Credited Service is not immunized because it is the continuation of another employer's pre-PDA policies. In *Bazemore*, this Court pointed out that an employment practice "that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date," and therefore the practice must be corrected. 478 U.S. at 395-96.

Despite PacBell's attempts to limit *Bazemore's* holding to non-seniority cases, its central holding that a violation of Title VII exists when a policy or practice treats similarly situated persons differently applies equally to service crediting practices which currently treat similarly situated employees differently on the basis of pregnancy. *Bazemore* did not distinguish its conclusions and analysis from that in *United Air Lines, Inc. v. Evans* on the basis

that *Evans* involved a seniority system. 478 U.S. at 396 n. 6. The distinction, as noted by the Ninth Circuit, between the instant case and *Bazemore* on the one hand, and the 703(h) seniority cases cited by PacBell on the other, is that the latter all involved adverse impact challenges to neutral employment practices.

D. The Ninth Circuit's Application of *Bazemore* is Not in Conflict With Decisions of Any Other Circuits.

There is no direct split in the Circuit Courts of Appeal which would warrant grant of certiorari. As the Ninth Circuit stated, "the controlling Supreme Court precedent [in this case] is *Bazemore v. Friday* [citation omitted]." Petition, App. at 6a. There is no split among the Circuits on the issue of *Bazemore*'s applicability to facially discriminatory employment systems.

PacBell's claim of a Circuit split relies entirely on court of appeals decisions decided *before* this Court's opinion in *Bazemore*. See Petition at 23-24. The fallacy of relying on pre-*Bazemore* Circuit decisions to argue the existence of a Circuit split is illustrated by the Second Circuit's decisions in *Sobel v. Yeshiva University*, 797 F.2d 1478 (1986), 839 F.2d 18 (2d Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989). After this Court decided *Bazemore*, the Second Circuit remanded *Sobel*, because the trial court "did not have the benefit of the views of the Supreme Court in *Bazemore*, particularly with respect to the significance of pre-act discrimination" 797 F.2d at 1479 (2d Cir. 1986).

In holding in *Sobel* that the plaintiff had properly stated a claim for relief when she alleged that the current salary disparities were illegal and perpetuated pre-Title VII disparities, the Second Circuit pointed out that, before this Court issued its opinion in *Bazemore*, lower courts had interpreted *Evans* as holding that discrimina-

tory disparities did not have to be corrected if they originated before the PDA applied. *Id.* at 24 (citing, as an example of this reasoning, *Farris v. Board of Education*, 576 F.2d 765, 769 (8th Cir. 1978) [cited in Petition at 24]). *Bazemore*, however, made it clear that such an interpretation of *Evans* was incorrect, because a present employment practice is illegal if it continues a pre-PDA discriminatory practice. 478 U.S. at 396 n.6.¹¹

Thus, rather than being in conflict, the only two Circuits that have applied *Bazemore*, other than for its holding on the issue of statistical analysis, the Ninth Circuit in the instant case and the Second Circuit in *Sobel*, are

¹¹ Thus, the two cases which petitioner cites as "in conflict" with the Ninth Circuit's opinion were based on reasoning explicitly rejected by the Court in *Bazemore*. In *Farris v. Board of Education*, 576 F.2d 765 (8th Cir. 1978), the plaintiff took a pregnancy disability leave at a time when Title VII did not apply to her employer and, as a result, was denied a salary increase that year and remained one step lower on the salary scale in future years. 576 F.2d at 768. The *Farris* court concluded that she could not challenge her lower paychecks, because during the year that she was gone on maternity leave and therefore received a smaller salary increase, Title VII did not apply to her employer. *Id.* at 768. In *Schwabenbauer v. Board of Education*, 777 F.2d 837 (2d Cir. 1985), which relied on the decision in *Farris*, the plaintiff was hired at a time when Title VII did not apply to her employer and state law provided that a teacher must serve a three-year probationary period before a tenure decision was made. *Id.* at 838-39. During her probationary period, she took a maternity leave. *Id.* at 838. When she was denied tenure, she claimed that she had acquired tenure by operation of law because if she had received credit for her maternity leave period, her tenure period ended at a time after which the employer allowed her to continue teaching. *Id.* Rather than examine whether the employer continued the pre-Act discrimination after the Act became applicable to the employer, as it would be required to do under *Bazemore*, the court considered it dispositive that the discriminatory practice occurred before the Act became applicable to the employer. *Id.* at 840-41.

in agreement. Petitioners have not pointed to, and respondent has not found, any post-*Bazemore* court of appeals decisions which conflict with the Ninth Circuit's decision in this case.

III. THE NINTH CIRCUIT DECISION COMPORTS WITH THE SUPREME COURT'S DECISION IN *FIRESTONE* AND DOES NOT CONFLICT WITH ANY DECISIONS UNDER ERISA OF OTHER COURTS OF APPEALS.

Throughout this litigation, Pallas has challenged, under ERISA, the employer's application of the ERO whereby Pallas' pregnancy disability leave taken prior to 1979 was excluded from her eligibility calculations under the pension plan. PacBell, however, casts Pallas' claim as one which challenges the employer's decision to offer particular benefits, here an early retirement option, to qualified, salaried employees. Thus, PacBell, citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), argues that ERISA does not prohibit discrimination by an employer with regard to its decision to provide or allocate benefits. PacBell argues further that no less than six circuit courts, including the Ninth Circuit Court of Appeals which decided in favor of Pallas, have recognized an employer's right to design, amend, or terminate an ERISA plan without implicating ERISA's fiduciary standards. Petition at 25-26.¹²

¹² The following cases, all cited by the PacBell, address employer decisions to create, amend or terminate benefit plans; *Fletcher v. Kroger Co.*, 942 F.2d 1137, 1139 (7th Cir. 1991) (employer decision to provide early retirement benefits for employees at specific locations); *Adams v. LTV Steel Mining Co.*, 936 F.2d 368 (8th Cir. 1991) (decision by employer to offer early retirement to specific employees based upon employer's desire to reduce work force); *Belade v. ITT Corporation*, 909 F.2d 736, 737-38 (2d Cir. 1990) (early retirement program offered to employees of "designated departments and units"); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. den.*, 490 U.S. 1020 (1989) (decision by employer to reduce retiree medical benefits); *Trenton v. Scott*

PacBell's argument misses the mark. Pallas has never taken issue with PacBell's decision to amend its pension plan and offer early retirement to those salaried employees with twenty years or more of service with the employer and/or its predecessor. Pallas, instead, challenges under ERISA the employer's interpretation of the pension plan which expressly predicated eligibility under the ERO upon an employee's "unadjusted term of employment." Pallas challenges PacBell's insistence that eligibility under the ERO depends upon a Net Credited Service date established by the predecessor employer and PacBell's refusal to credit all of her pregnancy disability leave taken in 1972.

PacBell's contention, relegated to a footnote in the Petition, that "there is no issue of improper plan administration" because Pallas' complaint "admits the *plan itself* made all of its benefits dependent upon Net Credited Service" is disingenuous. Petition at 28 n. 13 (emphasis in original). The Plan itself never mentions Net Credited Service, a point observed even by the district court. *See* Petition, App. at 23a. Moreover, Pallas' benefit claim was reviewed by two administrative committees established under the Pension Plan. The review committee making the final determination actually modified Pallas' eligibility date by including part of her pregnancy disability leave. Thus, this case presents precisely the type

Paper Co., 832 F.2d 806 (3d Cir. 1987), *cert. den.*, 485 U.S. 1022 (1988) (employer offered early retirement to employees at over-staffed plants but not "lean" plants); *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402 (2d Cir. 1985) (employer decision amending plan reducing the number of early retirement options for employees); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 631 (9th Cir. 1990) (employer and union free to negotiate the termination of pilots retirement plan without implicating fiduciary responsibilities); *Amalgamated Clothing and Textile Workers Union v. Murdock*, 861 F.2d 1406 (9th Cir. 1988) (decision to terminate pension plan as business decision of employer); *West v. Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987) (employer's efforts to renegotiate future unaccrued benefits were appropriate in its role as employer and not done as plan administrator). Petition at 25-29.

of benefit determination which the Supreme Court has said must be reviewed under ERISA's fiduciary standards. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), a decision not mentioned by PacBell, this Court reiterated its admonishment to the lower federal courts to "develop a federal common law of rights and obligations" under ERISA. *Id.* at —, 109 S.Ct. at 954. This Court held that the denial of benefits challenged under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), is reviewed under a *de novo* standard unless the plan gives the fiduciary discretionary authority to determine eligibility benefits or construe plan terms, in which case an "abuse of discretion" standard applied. *Id.* at 956.¹³

Pallas seeks precisely what the plan participant in *Firestone* sought: the review of a fiduciary's denial of her benefits claim. The court of appeals found that Pallas had stated a claim by alleging discrimination, based upon pregnancy, in the administration of the pension plan. Ultimately, the district court will have to look to the *Firestone* decision to determine what standard of review applies. PacBell, however, has articulated no reason for the Supreme Court to enter the fray.

The Court of Appeals for the Ninth Circuit recognized that Pallas attacked, under ERISA, PacBell's inter-

¹³ The Court rejected Firestone's argument that Congress's failure to enact a bill establishing the "*de novo*" standard of review for decisions denying benefits was a clear message to the Supreme Court not to adopt such a standard. This Court said, "We do not think that this bit of legislative inaction carries the day for Firestone." *Id.* at —, 109 S.Ct. at 956. Noting that "failure to act on the proposed bill is not conclusive of Congress' views on the appropriate standard of review," the Court adopted the "*de novo*" standard. *Id.* PacBell's half hearted argument that an amendment to ERISA specifically prohibiting discrimination based upon sex, race or national origin was proposed by Senator Mondale, thereby evidencing Congressional intent to protect fiduciary breaches involving sex discrimination from the reaches of ERISA, should be dispatched with equal ease by the Court.

pretation of, not its adoption of, the pension plan. The court of appeals' decision is consistent with this Court's decision in *Firestone* and certainly does not present the type of direct conflict between the circuits justifying review by the Supreme Court. See, e.g., *Marks v. U.S.*, 430 U.S. 188, 189 n. 1 (1977); *Aldinger v. Howard*, 427 U.S. 1, 3 (1976).

CONCLUSION

For all of the above-stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

29 U.S.C. § 1104 (a) (1) provides in pertinent part:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

APPENDIX B

29 U.S.C. § 1132(a) (1), (3) provides in pertinent part:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

• • •

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

• • •

APPENDIX C

Section 112 of the Civil Rights Act of 1991, 102 Pub. L. No. 166 (1991), is entitled "Expansion of Right to Challenge Discriminatory Seniority Systems" and provides in pertinent part:

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

- (1) by inserting "(1)" before "A charge under this section"; and
- (2) by adding at the end the following new paragraph:

"(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system."

MOTION FILED
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No. 91-812

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PACIFIC BELL, PACIFIC TELESIS GROUP,
PACIFIC TELEPHONE & TELEGRAPH COMPANY,
- PACIFIC TELESIS GROUP PENSION PLAN FOR
SALARIED EMPLOYEES,

v. *Petitioners,*

LANA PALLAS (aka Lana Hubbs),
and persons similarly situated,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION TO FILE BRIEF AS *AMICUS CURIAE*
AND BRIEF *AMICUS CURIAE* OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE PETITION

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**MOTION OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITION**

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Petition in this case. The petitioners have con-

sented, but counsel for the respondents have refused consent to the filing of this brief. In support of this motion, EEAC by the following, shows that this brief brings to the attention of the Court the relevance and importance of this case beyond that presented in the petition.

1. EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including over 250 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal aspects of EEO policies and requirements.

2. As employers, EEAC's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the other various statutes, federal orders and regulations pertaining to nondiscriminatory employment practices. Most of EEAC's members have programs or policies whose eligibility requirements depend upon the length of service of employees. Also, many members have voluntary or collectively-bargained seniority systems under which length-of-service requirements determine benefit eligibility or the relative benefit and employment status among covered employees. As such, EEAC members have a direct interest in the issues presented for the Court's consideration in this case. This interest extends far beyond the interests of the parties to this case and the particular system at issue herein.

3. Here, the plaintiff complained that she was denied service credit for time spent on maternity leave in 1972. As a result, she was ineligible in 1987 for the employer's early retirement program, which required 20 or more years of net credited service. The district court, relying on *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), dismissed the suit, as it was based upon a denial of service credit which was legal when it occurred and which has no present legal consequences. On appeal, however, a panel of the Ninth Circuit reversed the district court and held 2-1 that the employer's continued refusal to give maternity leave service credit was a present act of discrimination, and thus not barred by the *United Air Lines* decision.

4. As the dissenting opinion below illustrates, the Ninth Circuit's decision departs from settled law and threatens to cause enormous confusion. Employers with length-of-service requirements will face great uncertainty when computing benefit eligibility, because they cannot accurately predict when events that occurred in the distant past will resurface as the basis for challenging their determinations. In addition, the rights of other employees whose own eligibility will be affected by service computations would be disrupted if the decision is allowed to stand. Many EEAC members have operations in the Ninth Circuit and will be covered directly by the decision. Moreover, inasmuch as the decision appears to disrupt settled law, it could cause uncertainty for employers who operate in many different circuits.

5. Accordingly, because of the potentially enormous impact upon employer programs that depend upon length of service requirements and rights and benefits, Supreme Court review of this case is of vital

concern to EEAC's nationwide employer constituency, as well as to countless unions and employers subject to such systems.

6. Because of this interest, EEAC participated as *amicus curiae* in the primary cases involved in this case. See *United Airlines v. Evans*, 431 U.S. 553 (1977); *Bazemore v. Friday*, 478 U.S. 385 (1986). EEAC also filed briefs in a number of other cases involving interpretation of Title VII's timely-filing requirements, Section 706(e), 42 U.S.C. § 2000e-5(e). See *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); and *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). See also *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988). In addition, EEAC has filed *amicus* briefs in other cases involving an analysis of Title VII challenges to the maintenance of allegedly discriminatory seniority systems. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *California Brewrs Ass'n v. Bryant*, 444 U.S. 598 (1980); *Int'l Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); and *International U. of Elec. Wkrs. v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976).

7. EEAC moved to file a brief *amicus curiae* in the court below supporting Pacific Bell's petition for rehearing and suggestion for rehearing en banc. Pacific Bell's petition, however, was denied on September 26, 1991. As a result, when the court acted on EEAC's motion on October 23, 1991, the motion was denied as moot.

8. Pacific Bell's petition was filed with the Court on November 18, 1991. Accordingly, EEAC's brief is due to be filed no later than December 18, 1991. As EEAC's brief was filed before that date, it is timely under Rule 37.2 of this Court's Rules.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief *amicus curiae* in this case.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-812

PACIFIC BELL, PACIFIC TELESIS GROUP,
PACIFIC TELEPHONE & TELEGRAPH COMPANY,
PACIFIC TELESIS GROUP PENSION PLAN FOR
SALARIED EMPLOYEES,

v. - *Petitioners,*

LANA PALLAS (aka Lana Hubbs),
and persons similarly situated,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF *AMICUS CURIAE* OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE PETITION**

The Equal Employment Advisory Council ("EEAC"), respectfully submits this brief *amicus curiae* contingent upon the granting of the accompanying motion.¹ The brief supports the petition for

¹ A letter of consent from Pacific Bell's counsel consenting to the filing of EEAC's brief has been filed with the Clerk of the Court.

a writ of certiorari filed in this case by Pacific Bell, and urges reversal of the decision below.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

Plaintiff began employment with the predecessor of Pacific Bell in 1967. In 1972, she had a break in service during which she took pregnancy leave. At that time, the company treated pregnancy leave as "personal" leave, which did not count toward retirement service. Service credit was given for other temporary disability leaves taken during the same period.

When the Pregnancy Discrimination Act amendments to Title VII, 42 U.S.C. § 2000e(k) ("PDA"), became effective in 1979, Pacific Bell changed its policy to give service credit for pregnancy leave taken thereafter. It did not go back and retroactively adjust service credit to grant credit for pregnancy leave taken before the PDA took effect.

In 1987, Pacific Bell provided an Early Retirement Option (ERO), which was made available to employees with 20 or more years of net credited service. When plaintiff applied for the 1987 ERO, she was informed that she was a few days short of the 20 years of net credited service required to be eligible for the program. Had she been given credit for the time she spent on pregnancy leave in 1972, she would have met the eligibility requirements.

The plaintiff's lawsuit alleges that the failure to count her 1972 pregnancy leave toward her ERO eligibility violated Title VII as amended by the PDA.

The district court granted Pacific Bell's motion to dismiss the complaint. The district court stated that prior to the PDA amendments to Title VII, "employer disability benefit plans which failed to cover pregnancy-related disabilities were not unlawful. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401 (1976)." Pet. App. at 18A.²

The district court further noted that because the plaintiff had not preserved any claim of discrimination from 1972, "plaintiff's cause of action arises solely from post-1979 applications of her Net Credited Service without adjustment to credit the period of her 1972 pregnancy leave." *Id.* Judge Jensen also held that the policy was facially neutral, and that the complaint was based upon 1972 conduct that had no present legal consequences, citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

The Ninth Circuit below, in a 2-1 decision, reversed the district court. The panel majority held that *United Air Lines* did not dispose of the case. Rather, it concluded that *Bazemore v. Friday*, 478 U.S. 385 (1986), was the applicable decision. As the panel majority read *Bazemore*, "Although the employer was not liable for acts of discrimination that occurred prior to the enactment of Title VII, the Court held that an employer could be held liable for discrimination perpetuated after the Act took effect." Pet. App. at 6a. The panel majority thus ruled that "Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy." *Id.*, at 6a-7a.

Judge Dumbauld dissented, stating:

² Citations to the Petitioner's Appendix, including those to the decisions below, are designated as Pet. App. —.

[W]e confront a situation which we have no power to alleviate or remedy. The appellee telephone company has simply applied a seniority system, which it uses as the criterion for according many kinds of employee benefits, and appellant simply did not have enough seniority to qualify for the early retirement which she sought.

Pet. App. at 8a.³ The dissent stressed that the company lawfully excluded personal leave in determining service credits and that counting pregnancy leave as personal leave was lawful until the enactment of the PDA in 1978. Pet. App. at 9a.

Judge Dumbauld reasoned that Pacific Bell's policy was distinguishable from *Bazemore*, where a pay policy that was facially discriminatory against blacks constituted *present* discrimination with each pay check. Thus, when Pacific Bell looked at the plaintiff's net credited service, it merely applied preexisting seniority rules. Judge Dumbauld stated:

In the case at bar, by contrast [to *Bazemore*], all that the telephone company is currently doing is applying a bona fide seniority system, which is not discriminatory on its face, and is specifically authorized by Congress.

Pet. App. at 10a. The dissent thus would have affirmed the district court and dismissed the complaint.

³ Judge Dumbauld broadly defined a seniority system as: "a method of record-keeping and mathematical calculation which determines how long an employee has worked for the employer." Pet. App. at 6a.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

This *amicus curiae* brief is filed to stress the importance of the issues in this case beyond the particular employer and specific system of calculating time in service. EEAC's members are concerned that the Ninth Circuit's decision will disrupt many types of employer and union programs that depend upon length-of-service calculations. This could include a whole range of seniority benefits, as well as selection of days off, overtime distribution, pension calculations, wage adjustments and many other programs. Predictable length-of-service calculations, by contrast, "promote stability and certainty among employees, furnishing a predictable method by which to measure future employment positions." *California Brewers Ass's v. Bryant*, 444 U.S. 598, 605-06 (1980) (dissenting opinion of Justice Marshall).

The decision below is based upon a faulty assumption that the Petitioners can be held liable for a "program that adopted, and thereby perpetuated, acts of discrimination that occurred prior to enactment of the Pregnancy Discrimination Act [PDA]." Pet. App. at 6a-7a. In ruling that conduct that is not itself actionable can be the basis for a discrimination claim, the Ninth Circuit put itself at odds with the decisions of this and other courts. See, e.g., *United Air Lines v. Evans*, 431 U.S. 553 (1977); *Teamsters v. United States*, 431 U.S. 324, 353 (1977); *Schwabenbauer v. Bd. of Educ. of City of Olean*, 777 F.2d 837 (2d Cir. 1985); *Farris v. Bd. of Educ. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978).

The basic holding below is that the employer must now give service credits for leave time that the em-

ployer was permitted to treat as personal leave when the leave was taken. As this Court ruled: "to accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was [amended]." *Teamsters v. United States*, 431 U.S. at 353. Thus, the conduct at issue in this case "has no present legal consequences." *United Air Lines*, 431 U.S. at 558. The Ninth Circuit majority ruling, however, would improperly "destroy or water down the vested seniority rights of employees." *Id.*, at 352-53.

The Ninth Circuit, moreover, improperly applied *Bazemore v. Friday*, 478 U.S. 385 (1986), so as to undercut greatly *United Air Lines*. *Bazemore* found a violation because after Title VII was amended to apply to state and local governments, the employer continued to apply a facially *discriminatory* pay system that paid black workers less than whites for the same work. Here, the employer changed its leave policy immediately when the PDA came into effect. Moreover, *Bazemore* did not involve a facially *neutral* seniority system such as applied by Pacific Bell. For these reasons, we urge the Court to grant the petition for review in this case.

REASONS FOR GRANTING THE WRIT

**THE NINTH CIRCUIT'S DECISION REQUIRING THE EMPLOYER TO GIVE SERVICE CREDITS FOR PRE-
ACT PREGNANCY LEAVE IS CONTRARY TO PRE-
VAILING LAW, CONFLICTS DIRECTLY WITH THE
SUPREME COURT'S *UNITED AIR LINES* DECISION
AND WOULD GREATLY DISRUPT LEGITIMATE
LENGTH-OF-SERVICE AND SENIORITY SYSTEMS
OF EMPLOYERS GENERALLY**

A. The Decision Below Conflicts With Controlling Supreme Court Decisions And Other Lower Court Decisions Holding That Neutral Length-of-Service (Seniority) Systems Do Not Have To Be Disrupted Because Of The Effects Of Past Conduct That Has No Present Legal Consequences

The decision below holds that Pacific Bell violated Title VII in the following manner:

In 1987, Pacific Bell instituted a program that *adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act.* While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy.

Pet. App. 6a-7a (emphasis added). This unique holding is of great concern to the large majority of private employers, who have relied upon contrary decisions to conclude that promotions and other scarce employee benefits can be allocated in accordance with neutral length-of-service and seniority systems that cannot be challenged based upon distant allegations that "ha[ve] no present legal consequences." *United Air Lines, Inc. v. Evans*, 431 U.S. at 558.

The position taken by the panel majority was rejected by the Supreme Court a decade and a half ago. As the Court stated in the *Teamsters* decision:

[O]ur reading of the legislative history [of Title VII] compels us to reject the Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be "bona fide." *To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted.* It would place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority. *The consequences would be a perversion of the congressional purpose.*

431 U.S. 324, 353 (1977) (emphasis added). As the Court explained, even a length-of-service requirement that perpetuates the effects of pre-Act discrimination will not violate Title VII:

Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Id. at 352-53.

These principles were also applied in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, which the district

court and Judge Dumbauld correctly saw as controlling precedent requiring dismissal of the complaint in the instant case. As *amicus curiae*, EEAC urges the Court to review the decision below in order to preserve the effectiveness of *United Air Lines* in assuring an orderly and predictable relationship in the allocation of jobs and employee benefits. Failure to reverse the Ninth Circuit's decision would threaten to disrupt many valid length-of-service and seniority systems.

United Air Lines involved a situation strikingly similar to the instant case. The plaintiff there worked as a flight attendant from 1966 to 1968. When she married in 1968, she was required to resign under United's policy of refusing to allow its female flight attendants to be married. In 1972, Evans was rehired as a new employee. She was not given any seniority credit for her prior service and "for seniority purposes, she [was] treated as though she had no prior service with United." 431 U.S. at 555.

Evans claimed that United was guilty of a present violation because it failed to give her credit after her rehire for service prior to her illegally-forced resignation in 1968. The Court explained that assuming her 1968 separation violated Title VII, "the question now presented is whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972 [when she was rehired]." *Id.* at 554. As the district court there noted, Evans was "seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation." *Id.* at 556 n.8.

The Supreme Court held that United was entitled to "treat that past act *as lawful* after respondent

failed to file a [timely] charge." 431 U.S. at 558 (emphasis added). An alleged discriminatory act that has not been made the subject of a timely charge, the Court held, "is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* Thus, the act was "merely an unfortunate event in history which has no present legal consequences." *Id.* (emphasis added).⁴

The Ninth Circuit here, however, mistakenly held that the *United Air Lines* line of cases does not apply, and that this case is controlled by *Bazemore v. Friday*, 478 U.S. 385 (1986). In *Bazemore*, however, no neutral seniority or length-of-service policy was involved. Indeed, *Bazemore* distinguished *Evans* because the plaintiff in the latter case "had made no allegation that the seniority system itself was intentionally designed to discriminate." 478 U.S. at 396 n.6.⁵ By

⁴ *Accord, Schwabenbauer v. Bd. of Educ. of City of Olean*, 777 F.2d 837, 840 (2d Cir. 1985) (In computing whether employee completed probationary period, employer was not required to credit plaintiff's seven months of maternity leave taken prior to the 1972 amendments applying Title VII to state and local governments); *Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978) (No violation even though failure to credit pre-1972 mandatory maternity leave kept plaintiff one step behind in salary schedule).

⁵ Similarly, in the instant case, there can be no valid claim that the seniority system was adopted with a discriminatory intent. On a related matter, Section 112 of the recently-enacted Civil Rights Act of 1991 has no applicability to this case. In the first place, Section 118 is inapplicable because it does not apply to lawsuits pending when it was enacted, but shall only "take effect upon enactment." 137 Cong. Rec. S 15276 (daily ed. Oct. 25, 1991). See *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468, 471 (1988).

In addition, Section 112 only reverses the decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

contrast, as the *Bazemore* decision stated, the policy there was discriminatory on its face. The employer applied different wage scales to black workers than to whites before the 1972 effective date of Title VII, and continued to pay those discriminatory wages after it became subject to Title VII. In rejecting the application of *United Air Lines* to this case, the court of appeals reasoned that Pacific Bell's Early Retirement Opportunity was a new benefit program instituted long after the enactment of the PDA, and that the system was not facially neutral because it discriminated against women who had taken pregnancy leave before the PDA became effective in 1979. Pet. App. at 6a.

But the Ninth Circuit's reasoning is fatally flawed. The conduct it found illegal—the employer's failure to give service credit for pregnancy leave—occurred

Section 112 is not a substantive provision; it merely extends Title VII's charge-filing period. There is no question about the timeliness of the charge in the instant case. Further, Section 112 is limited to cases where, unlike here, it is alleged that a seniority system "has been adopted for an intentionally discriminatory purpose." Only in those cases does Section 112 extend the time for the filing of a timely charge beyond the date the system is adopted to include the date when the individual becomes subject to the system or is injured by its application. See 137 Cong. Rec. S 15275 (daily ed. Oct. 25, 1991).

As to substantive matters, it is clear that Section 112 "should not be interpreted to affect the sound rulings of the Supreme Court regarding 'continuing violations' theory under Title VII. See *Delaware State College v. Ricks*, 449 U.S. 250 (1980)." 137 Cong. Rec. S 15485 (daily ed. October 30, 1991) (Sen. Danforth); and 137 Cong. Rec. H 9530 (daily ed. Nov. 7, 1991) (Rep. Edwards). *Ricks*, of course, reaffirmed *United Air Lines v. Evans*.

not in 1987, but in 1972, when it was lawful. All Pacific Bell did in 1987 was apply a facially neutral length-of-service system based on the service credits for which employees were eligible based upon prevailing law in effect when the personal leave was taken. As the dissent put it, the Company "has simply applied a seniority system, which it uses as the criterion for according many kinds of employee benefits, and the appellant simply did not have enough seniority to qualify for the early retirement which she sought." Pet. App. at 8a.

The Supreme Court held in *United Air Lines* that there could be no violation premised on the fact that at a much later date, the employer made a seniority calculation that excluded from prior service time during which the employee presumably would have worked had she not been illegally discharged because she became married. Such conduct was illegal when it occurred. Thus, there is an even stronger argument in the instant case to apply the rationale of *United Air Lines*, because the treatment of maternity leave as "personal leave" did not violate Title VII until the PDA became effective in 1979.

The decision below thus directly conflicts with *United Air Lines* and is likely to cause extreme confusion for large employers with operations in the Ninth and other circuits. Unless reversed, the decision will make it impossible for employers to know when previously legal or time-barred allegations might resurface to jeopardize benefit calculations or the allocation of job rights based upon relative length-of-service.

B. The Decision Below Will Disrupt The Administration of Seniority and Length-of-Service Systems, Causing Conflict With Title VII's "Special Treatment" of Such Systems

If left standing, the court of appeals' decision in this case will disrupt seniority and length-of-service requirements in a manner directly contrary to Congressional intent. This disruption is likely to affect many types of employer and union programs that depend upon length-of-service calculations.

In Title VII, Congress "afforded special treatment" to seniority systems. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). Congress made it explicit that it did not intend to "destroy or water down the vested seniority rights of employees" under neutral seniority systems. *International Bro. of Teamsters v. United States*, 431 U.S. 324, 352-53 (1977).

Although Title VII does not define the term "seniority system," this Court has held that the term should be defined broadly.

In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that, alone or in tandem with non-"seniority" criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase. . . [T]he principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

California Brewers Ass'n v. Bryant, 444 U.S. 598, 605-06 (1980). Thus, the length-of-service feature "promotes stability and certainty among employees, furnishing a predictable method by which to measure

future employment positions.” 444 U.S. at 614 (dissenting opinion by Justice Marshall).

The use of length-of-service requirements permeates corporate labor relations policies. For example,

Collective agreements generally provide for the recognition of seniority in several, and often many, aspects of the employment relationship. Among these are promotions, layoffs, rehiring, shift preference, transfers, vacations, days off, and overtime fork.

F. Elkouri and E. Elkouri, *How Arbitration Works* 590 (4th ed. 1985). Also, over the years, there has been:

a dramatic rise in the number and types of benefit programs. Almost without exception, entitlement to these new benefits has been geared to seniority. In fact, this was occasionally a part of bargaining strategy; the new benefit was made more palatable cost-wise to management by limiting it to employees with long service.

S. Slichter, J. Healy, and E. Livernash, *The Impact of Collective Bargaining on Management* 105 (1960).⁶

⁶ The authors provide an extensive listing of areas affected by length of service requirements: selection of days off; overtime distribution; vacation privileges; parking privileges; vacations; pensions; severance pay; holidays; sick leave; group life and hospitalization insurance; health and welfare plans; unemployment benefits; intra-range wage movements; length-of-service wage adjustments; promotions; and long service awards. *Id.* at 106-12. For other examples, see *Collective Bargaining Negotiations and Contracts* (BNA) at 44:51-44:52 (insurance); 48:51-48:56 (retirement, annuity and death benefits); 58:7 (holiday pay); 91:3-91:5 (vacations).

As a representative of a large and diverse group of major employers who use and administer such systems on a daily basis, EEAC urges this Court to consider the disruptive impact its decision in this case could have on the whole range of employer programs based upon length-of-service and seniority calculations. Before compelling employers, in effect, to recalculate virtually all employee benefit and seniority rights, as they will either have to do or risk discrimination findings based upon outdated or time-barred claims if this decision stands, EEAC urges the Court to grant the petition and review the decision of the court below.

CONCLUSION

For the foregoing reasons, the *amicus curiae* EEAC urges the Court to grant Pacific Bell's petition for writ of certiorari.

Respectfully submitted,

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October Term, 1991

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MOTION TO FILE BRIEF AS AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE
CALIFORNIA EMPLOYMENT LAW COUNCIL
IN SUPPORT OF THE PETITIONERS

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Petition For Writ Of Certiorari To The
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MOTION OF THE CALIFORNIA EMPLOYMENT
COUNCIL FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE IN SUPPORT
OF THE PETITIONERS

To the Honorable, the Chief Justice and the Associate
Justices of the United States Supreme Court:

Pursuant to Rules 37.1 and 37.2 of the Rules of this
Court, the California Employment Law Council ("CELC")

respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of petitioners in this case. The petitioners have consented, but we have been unable to contact counsel for the respondents to obtain consent to the filing of this brief. In support of this motion, CELC by the following shows that this brief brings to the attention of the Court the relevance and importance of this case beyond that presented in the petition.

1. CELC is a voluntary, nonprofit organization formed to promote the common interest of employers and the general public in sound principles of law pertaining to employment practices. CELC's membership consists of approximately 65 employers representing a broad segment of the employer community in California. CELC members employ well in excess of 500,000 California employees.

2. As California employers, CELC's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, et seq.), the California Fair Employment and Housing Act (Cal. Gov't Code § 12900, et seq.), and the other various federal and California statutes, orders and regulations pertaining to nondiscriminatory employment practices. CELC members are also subject to the provisions of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1101, et seq.).

3. Most of CELC's members have seniority-based programs or policies in which employment benefits and

rights are determined by the employee's length of service. Because all CELC members conduct business in California, all CELC members will be directly and permanently affected by the decision of the Ninth Circuit in this matter unless the petition for writ of certiorari is granted.

4. The CELC believes the petition for writ of certiorari should be granted. The Ninth Circuit's decision is contrary to this Court's holding in *United Airlines v. Evans*, 431 U.S. 553 (1977) which held that it is lawful to make current decisions that base employment benefits on a facially neutral seniority system, even if past acts of discrimination affect seniority credit. Under *Evans* and its progeny, employers are able to continue the long-standing and widely accepted use of seniority for determining employee rights and benefits, despite the fact that prior acts of discrimination may have diminished the seniority of employees in protected groups. By its misreading and misapplication of the principles contained in *Evans*, the Ninth Circuit undermines the use of seniority systems despite express Congressional sanction of their use in Title VII, and despite the widely held belief that seniority is a fair and appropriate way to determine employee benefits and rights.

5. The Ninth Circuit's opinion imposes a new and novel fiduciary duty on employers when they design ERISA plans. Despite the fact that Pacific Bell's plan violates no specific legal prohibitions contained in ERISA or arising out of any independent statutory obligations,

the Ninth Circuit's decision imposes an undefined obligation on employers independent of Title VII not to "discriminate" in the design of ERISA plans.

6. CELC filed a motion for leave to file a brief *amicus curiae* in the court below supporting Pacific Bell's petition for rehearing *en banc*. This motion was granted by order dated September 6, 1991.

7. Pacific Bell's petition was filed with this Court on November 18, 1991. Accordingly, CELC's brief, filed December 18, 1991, is timely under Rule 37.2 of this Court's Rules.

WHEREFORE, it is respectfully moved that CELC be granted leave to file the accompanying brief *amicus curiae* in this case.

Respectfully submitted,

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December 18, 1991

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The California Employment Law Council ("CELC"),
respectfully submits this brief amicus curiae contingent
upon the granting of the accompanying motion.¹ The

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filing of CELC's brief has been filed with the Clerk of the
Court.

brief supports the petition for a writ of certiorari filed in this case by Pacific Bell, and urges reversal of the decision below.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is fully set forth in the accompanying motion for leave to file a brief as amicus curiae.

STATEMENT OF THE CASE

Respondent Lana Pallas has been employed by Pacific Bell and its predecessor, Pacific Telephone & Telegraph, since 1967. Respondent became pregnant and took a leave of absence in 1972. In accordance with Pacific Bell's practice at that time, this absence was counted as personal leave, rather than as disability leave. Employees on personal leave do not earn Net Credited Service during their absences (except for the first 30 days), whereas employees on disability leave accumulate Net Credited Service during their entire absence. Respondent's Net Credited Service Date was affected by this action.

Pacific Bell's determination that Respondent's 1972 absence due to pregnancy should not be treated as disability leave was lawful under the sex-discrimination provisions of Title VII of the Civil Rights Act of 1964 in effect at that time. In 1979, when the Pregnancy Discrimination Act ("PDA") (42 U.S.C. § 2000e(k)) amended Title VII to

require that pregnancy be treated as a disability, Pacific Bell began treating pregnancy leave as disability leave.

In 1987, the Company amended its retirement plan to provide for an early retirement option ("ERO") for which employees with 20 or more years of Net Credited Service were eligible. Respondent applied for the ERO benefit but was deemed ineligible due to her lack of Net Credited Service. Respondent alleges that she would have been eligible for the ERO if the Company had treated her 1972 absence from work due to pregnancy as a disability leave rather than as personal leave.

In her complaint, respondent alleges that reliance on Net Credited Service to determine her eligibility for ERO violated Title VII, the California Fair Employment and Housing Act ("FEHA"), and the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001, et seq.) ("ERISA") because her Net Credited Service does not include the time she was absent in 1972 due to pregnancy.

The district court granted Pacific Bell's motion to dismiss the complaint. The court held that Pacific Bell's determination to base eligibility for ERO on service credit was facially neutral and, therefore, under this Court's decision in *United Air Lines v. Evans*, 431 U.S. 553 (1977), did not violate Title VII. Pet.App. at 19a. The district court also dismissed respondent's third cause of action under ERISA on the ground that ERISA does not provide an independent standard of fairness or discrimination that regulates an employer's design of an ERISA benefit plan. *Id.* at 22a.

The Ninth Circuit, in a 2-1 decision, reversed. The panel majority concluded that the district court erred in relying on *Evans* for two reasons: (1) because the ERO was instituted in 1987, plaintiff is not challenging the impact of a long-past act of discrimination but, instead, is challenging a current violation; and (2) the ERO is not facially neutral – it facially discriminates against pregnant women. Pet.App. at 5a-6a. The court concluded that by instituting the ERO in 1987, Pacific Bell “adopted, and thereby perpetuated, acts of discrimination which occurred prior to the enactment of the Pregnancy Discrimination Act.” Pet.App. at 6a.

The majority also held that plaintiff had stated a cognizable claim under ERISA. The court stated that calculation of the service term for purposes of eligibility is subject to review for breach of fiduciary duty and that discrimination constitutes a breach of fiduciary duty. Pet.App. at 10a-11a.

In his dissent, Judge Dumbauld found that ERO did not violate Title VII, stating:

“[A]ll the telephone company is currently doing is applying a bona fide seniority system, which is not discriminatory on its face, and is specifically authorized by Congress. Such current activity of the company * * * consists simply of examination of the company’s records and adding up the time the employee has worked

for the company, as disclosed by those records. Neither we nor the telephone company can erase or change history. * * * Appellant's grievance is one that belongs to history; it is not a current violation of the law." Pet.App. at 10a-11a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision exposes employers to current liability for long past and closed incidents that have been incorporated into an employee's seniority if they choose to base current employment decisions on seniority. Its effect inevitably will be to deter the use of this common and accepted basis for making pay, benefits, lay-off and other employment decisions. This not only conflicts with this Court's decision in *United Airlines v. Evans*, 431 U.S. 553 (1977), but with section 703(h) of Title VII (42 U.S.C. § 2000e-2(h)) in which Congress explicitly provided that use of seniority systems for such purposes is lawful.

The Ninth Circuit's determination that Respondent states a claim under ERISA for discrimination is equally flawed. The Ninth Circuit's decision imposes an undefined obligation on employers not to "discriminate" in their plan design despite the fact that no provision in ERISA requires an employer to design plans in a manner which provides identical benefits to all employees.

For these reasons, we urge the Court to grant the petition for review in this case.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT, THE NINTH CIRCUIT'S OPINION MAKES IT UNLAWFUL TO USE A FACIALLY NEUTRAL SENIORITY SYSTEM FOR DETERMINING EMPLOYEE RIGHTS IF SENIORITY GIVES PRESENT EFFECT TO A LONG PAST ACT OF ALLEGED DISCRIMINATION.

A. The Ninth Circuit's Decision Will Undermine the Widely Accepted and Congressionally Sanctioned Use of Seniority.

If allowed to stand, the Ninth Circuit's decision will have immense practical consequences. It places at risk any employer who wishes to use seniority when determining new employee rights or benefits. That is because seniority, by its very nature, incorporates the results of all previous employment decisions that occurred during such employee's entire employment history.

The Ninth Circuit's reasoning extends to any past event subsequently made unlawful that resulted in a denial of employment continuity or affected seniority in a given position.² The Ninth Circuit's decision concludes

² For example, if layoffs in a department were based on seniority in the department, and a department employee claims that years earlier he was repeatedly denied a transfer to the department because of what is later held to be race

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that the use of seniority is valid only if every past employment decision affecting seniority is also valid, and that those decisions must be judged by today's standards, not the laws in effect at the time. Thus, the Ninth Circuit's reasoning gives retroactive effect, through seniority recalculations, to extensions of civil rights protections to newly covered employees or newly protected groups. *See, e.g.,* Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, 86 Stat. 103 (extending Title VII to state and local government and education institutions) and Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (extending protections to individuals with disabilities).

As a result, in implementing new pay, benefits and layoff programs, employers not willing to risk renewed liability for alleged past acts (or as in this case, liability for acts which were lawful when taken but are now prohibited) will be forced to either (1) attempt to recalculate each employee's seniority to ensure that no past act of arguably unlawful discrimination that occurred at any time during the course of an employee's entire employment history has affected the seniority calculation, or (2) forgo using seniority as a basis for determining eligibility or rights under new employee benefit or layoff programs.

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discrimination, that employee may be able to state a claim under the Ninth Circuit's decision. The employer would then have to review each transfer decision affecting the employee to determine if he was affected by long past acts of discrimination and alter the employee's seniority accordingly. If the dates that the transfer should have taken place are now unknown, it would be impossible accurately to assess seniority.

The first alternative will, in most cases, be impossible. Employers would have to guess what actions could have given rise to claims of discrimination. Even if they could pin point arguably unlawful past decisions, the company's records will frequently not contain adequate information to determine when such decisions occurred or which employees may have been affected.³ In those rare cases when recalculations could be accomplished, they could result in many employees *not* receiving the benefits, rights and protections they legitimately expect by virtue of long-standing seniority calculations because they are displaced due to revised calculations. For example, an employee may justifiably believe that he or she is protected from layoff due to his or her seniority status and thus forgo other employment opportunities, only to find that he or she is now at risk because his or her employer has recalculated seniority credit.

³ For example, in this case, the employer's records may simply indicate that an employee was on "personal leave" and not give any indication whether the leave was related to pregnancy disability.

The Ninth Circuit's decision, if allowed to stand, will have a dramatic effect on record retention policies of employers. Currently, for the purposes of Title VII, employers generally are obligated to maintain employee records for only one year from the date of making the record or from the personnel action involved. 56 Fed.Reg. 35753 (effective Aug. 26, 1991). If the Ninth Circuit's decision is allowed to stand, California employers who wish to use seniority to determine employee benefits or rights, will need to retain records until the death of the current or former employee if they wish to justify seniority determinations.

Unions, which traditionally rely on seniority to determine rights and benefits, will also be adversely affected by the Ninth Circuit's decision. This decision could unsettle labor-management relations by provoking arbitration or litigation over issues previously handled routinely by reference to seniority rosters and cause employers to resist using seniority for determining future entitlements.

As a result of the enormous practical problems in recalculating seniority every time a new pay or benefits decision is made, the second alternative, that of forgoing the accepted and pervasive use of seniority in making employment decisions, is the most probable result of the Ninth Circuit's decision. This will not only hamper employers' ability to determine eligibility for new benefits or rights under layoff programs, it will also make employers reluctant to grant benefits such as early retirement options that would otherwise be granted to long-term employees due to their loyal service. Despite a widely held belief that seniority is the most fair and appropriate way of determining employee rights and benefits, this decision, if allowed to stand, will make it too risky for employers to continue rewarding employees for their long-term loyal service.

Finally, the Ninth Circuit's decision, if allowed to stand, will undermine Congress' clearly stated intent to encourage the use of seniority systems.⁴ Section 703(h) of

⁴ Section 112 of the Civil Rights Act of 1991 amends section 706(e) of the Civil Rights Act of 1964 to overrule the holding of *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900

(Continued on following page)

Title VII (42 U.S.C. § 2000e-2(h)) states that: "it shall *not* be an unlawful employment practice" to base terms and conditions of employment on a bona fide seniority system. In making this express provision for the continued use of seniority systems in reaching current benefits decisions, Congress was keenly aware of the previous use of such systems, and of the impairment of legitimate employee expectations that would result if use of such systems to determine current benefits were to expose an employer to liability, as the Ninth Circuit's decision in the present case does.⁵

B. The Ninth Circuit's Decision Misconstrues This Court's Decision in *United Airlines v. Evans*.

In *Evans*, plaintiff was forced to resign when she married. This forced resignation the Court found might well have been unlawful if challenged in a timely manner. Under the employer's seniority system, resigning

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(1989), permitting subsequent challenges to a seniority system that has been adopted for an "intentionally discriminatory purpose." Section 112 makes no changes to section 703(h) and does not disturb *Evans* and other decisions of this Court which do not involve intentionally discriminatory seniority systems. See 137 Cong.Rec. S15477 (daily ed. Oct. 30, 1991) (statement of Senator Dole).

⁵ For this reason, the Ninth Circuit's reliance on *Bazemore v. Friday*, 478 U.S. 385 (1986) is misplaced. *Bazemore* did not involve a seniority system giving some current effect to a previous decision. It instead involved a discriminatory practice which had its inception prior to the Act but had continued into the present and thus was a *current* act of discrimination. In contrast, in the present matter, the company is merely applying a bona fide facially neutral seniority system which has been specifically authorized by Congress.

employees lost all seniority. Several years later, plaintiff was rehired but received no seniority credit for her earlier service. Denial of seniority credit had an adverse effect on her current pay and fringe benefits.

Although the Court found that the seniority system gave "present effect to a past act of discrimination" (431 U.S. at 558), the Court held that there was no present violation of the statute:

"a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." *Id.* at 560.

As in *Evans*, respondents in this action challenge the employer's early retirement program because a past event of no present legal significance – the classification of pregnancy disability leave as "personal leave" in 1972 – has affected the calculation of seniority credit which is the basis for determining current eligibility for an early retirement program. Under *Evans*, even if the classification system used by the employer prior to 1979 was unlawful,⁶ no current violation of Title VII has occurred merely because the classification has a continuing effect on Respondents' seniority-based benefits.

⁶ In fact, the classification system at issue here was *not* unlawful at the time it was in effect because, prior to the Pregnancy Discrimination Act amendment to Title VII, employers were not required to treat pregnant women like temporarily disabled men. See *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

The Ninth Circuit attempts to distinguish *Evans* on two grounds: (1) Pacific Bell's Early Retirement Option was adopted in 1987 and thus Respondents had brought a timely challenge to this new benefit program; and (2) the seniority system used to determine eligibility for the program facially discriminates against pregnant women. Both of these attempts to distinguish *Evans* are based on a misconstruction of *Evans* and its progeny and a misstatement of the record.

Respondents' claim that their charge is timely because they are challenging a benefit program established in 1987 is based on a faulty analysis of *Evans*. In *Evans*, the plaintiff likewise had filed a timely claim; nevertheless this Court found the relevant inquiry to be whether the "employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to [her rehire]." 431 U.S. at 554. This Court held that failure to give plaintiff seniority credit, even though her 1968 "resignation" may well have been unlawful, did not establish a current violation of the Act despite the fact that plaintiff's current salary and benefits were diminished due to lack of seniority. Similarly, it is not a current act of discrimination for an employer to rely on a facially neutral seniority system for determining eligibility for a newly established benefit program even if the net service credit used to determine seniority is affected by the 1972 action of classifying absence as personal leave. *Accord Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) ("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences"). Thus, the fact that the

Respondents' attack against the 1987 benefit plan is timely is of no moment because the plan does not violate Title VII.⁷

The Ninth Circuit's assertion that the "net credit system used to calculate eligibility under the ERO is not facially neutral" but "discriminates against pregnant women" disregards precedent and defies logic. Clearly, the system relies on seniority. The eligibility criteria do not refer to pregnancy. It is true that prior to 1979 pregnancy disability leaves were deemed "personal leaves" and that plaintiff's long-established seniority date incorporates the 1972 application of this pre-1979 policy. However, these facts do not make the seniority system discriminatory "on its face." Only where a plan contains a discriminatory term in its text has this Court found "facial discrimination." See, e.g., *Automobile Workers v. Johnson Controls, Inc.*, 111 S.Ct. 1196, 113 L. Ed. 2d 158 (1991) (policy excluding "women who are pregnant or who are capable of having children" is facially discriminatory). See *Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765, 768 (8th Cir. 1978) (salary scale based on annual years of service sex neutral, even though women

⁷ See *Schwabenbauer v. Bd. of Educ. of City of Olean*, 777 F.2d 837 (2d Cir. 1985) (rejecting claim that plaintiff's 1972 dismissal constituted current violation since she would have had enough service to receive tenure but for employer's failure to credit her 1970 maternity leave); *Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978) (rejecting claim that employer's current salary schedule, which was based on seniority, violated Title VII since employee's mandatory maternity leave absences were not credited).

taking pre-1972 maternity leaves were not granted service credit for the year of their maternity leave).

The panel appears to argue that the seniority system is facially discriminatory because it has "adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act." Pet.App. at 6a. This, however, is the exact argument rejected in *Evans*. In that case this Court held that the seniority plan was "neutral in its operation" despite the fact that it gave present effect to a previous act of discrimination. 431 U.S. at 558.

II. CONTRARY TO WELL ESTABLISHED LAW, THE NINTH CIRCUIT STATES THAT BENEFIT PLAN DESIGNS MAY BE CHALLENGED EVEN IF THEY DO NOT VIOLATE SPECIFIC PROHIBITIONS IN ERISA OR INDEPENDENT STATUTORY OBLIGATIONS.

The Ninth Circuit's decision that appellants state a claim under ERISA for discrimination in breach of the employer's fiduciary duty disregards the established principle that, aside from the specific legal prohibitions contained in ERISA or arising out of independent statutory obligations, the courts are not authorized to scrutinize the appropriateness of the design of a single-employer benefit plan. Numerous cases in other circuits have held that in the case of a single-employer plan, a

company does not act as a fiduciary when it establishes, amends, terminates or designs a benefit plan.⁸

ERISA plans may be challenged on the ground that they violate some independent statutory obligation, such as Title VII. However, no provision of ERISA gives the courts the right to set an independent standard of "fairness" or to challenge the plan's design due to "discrimination" not prohibited by independent statutory obligations. No ERISA provision "requires an employer to provide identical benefits to employees when the employer designs a plan." *Trenton, supra*, 832 F.2d at 809

⁸ See, e.g., *Musto v. American General Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) (great difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be; a company acts as a fiduciary in performing the first task, but not the second.); *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1416-1417 (2d Cir. 1985), *quoting Amato v. Western Union Intern., Inc.*, 596 F.Supp. 963, 968 (S.D.N.Y. 1984) (Employers "assume fiduciary status only when and to the extent they" function in their capacity as plan administrators - not when they design their pension plans and act as a corporate employer). *Accord, Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) (court rejected plaintiff's claim that retirement board breached its fiduciary duties in adopting and implementing an early retirement option which benefitted some employees and not others since the plan design was purely a corporate management decision).

(court adopting employer's analysis). As explained in *Moore v. Reynold Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985):

*"In enacting ERISA, Congress continued its reliance on action by employers * * *. Neither Congress nor the courts are involved in the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation. Absent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan."* (Citations omitted emphasis added.)

Moreover, ERISA itself does not contain any substantive prohibition against sex discrimination. Congress considered and explicitly rejected an amendment to include in ERISA substantive prohibition of sex discrimination, choosing to rely on Title VII as the source of substantive law in this area. 119 Cong.Rec. 24456-57, 30410 (1973). Thus, an ERISA plan can only be deemed an unlawful act of discrimination on the basis of sex if it violates Title VII – something the plan at issue does not do.

The Ninth Circuit's reliance on *Elser v. I.A.M. Not. Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983) is misplaced because *Elser* involved the administration of a *multi-employer* plan. As the *Musto* court explained, there is an important distinction between reviewing the terms of a *multi-employer* pension plan for the general fairness of its "allocation" of benefits and reviewing the terms of a *single-employer* plan:

"In amending a *multi-employer* plan, where the level of contributions of each participating employer has generally been set by collective bargaining the trustees 'affect the allocation of a finite plan asset pool between participants,' as defendants point out in their brief, and hence act as plan administrators subject to a fiduciary duty. But when, as here, there is only one employer, there is normally no 'plan asset pool' to be affected. In amending a *single employer* plan, therefore, the company normally acts in its role as employer, not in its role as fiduciary." 861 F.2d at 912 (second and third emphasis added).

The Ninth Circuit's determination that the design and allocation of benefits under a single-employer ERISA benefit plan is subject to a *fiduciary* standard of review and thus subject to challenge for "discrimination" on a basis *not* made unlawful by some independent statutory obligations or specific provision of ERISA, is contrary to well-settled law. This unprecedented and undefined standard of review will create confusion among the lower courts. Moreover, this newly imposed standard of review will be a deterrent on employers' willingness to create and fund purely voluntary benefit plans for their employees.



CONCLUSION

For the foregoing reasons, Amicus Curiae California Employment Law Council urges the Court to grant Pacific Bell's petition for writ of certiorari.

Respectfully submitted,

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No. 91-812

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1991

PACIFIC BELL, PACIFIC TELESIS GROUP,
PACIFIC TELEPHONE & TELEGRAPH COMPANY,
PACIFIC TELESIS GROUP PENSION PLAN FOR
SALARIED EMPLOYEES,

Petitioners,

v.

LANA PALLAS (aka Lana Hubbs),
and persons similarly situated,

Respondents.

**On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' REPLY BRIEF

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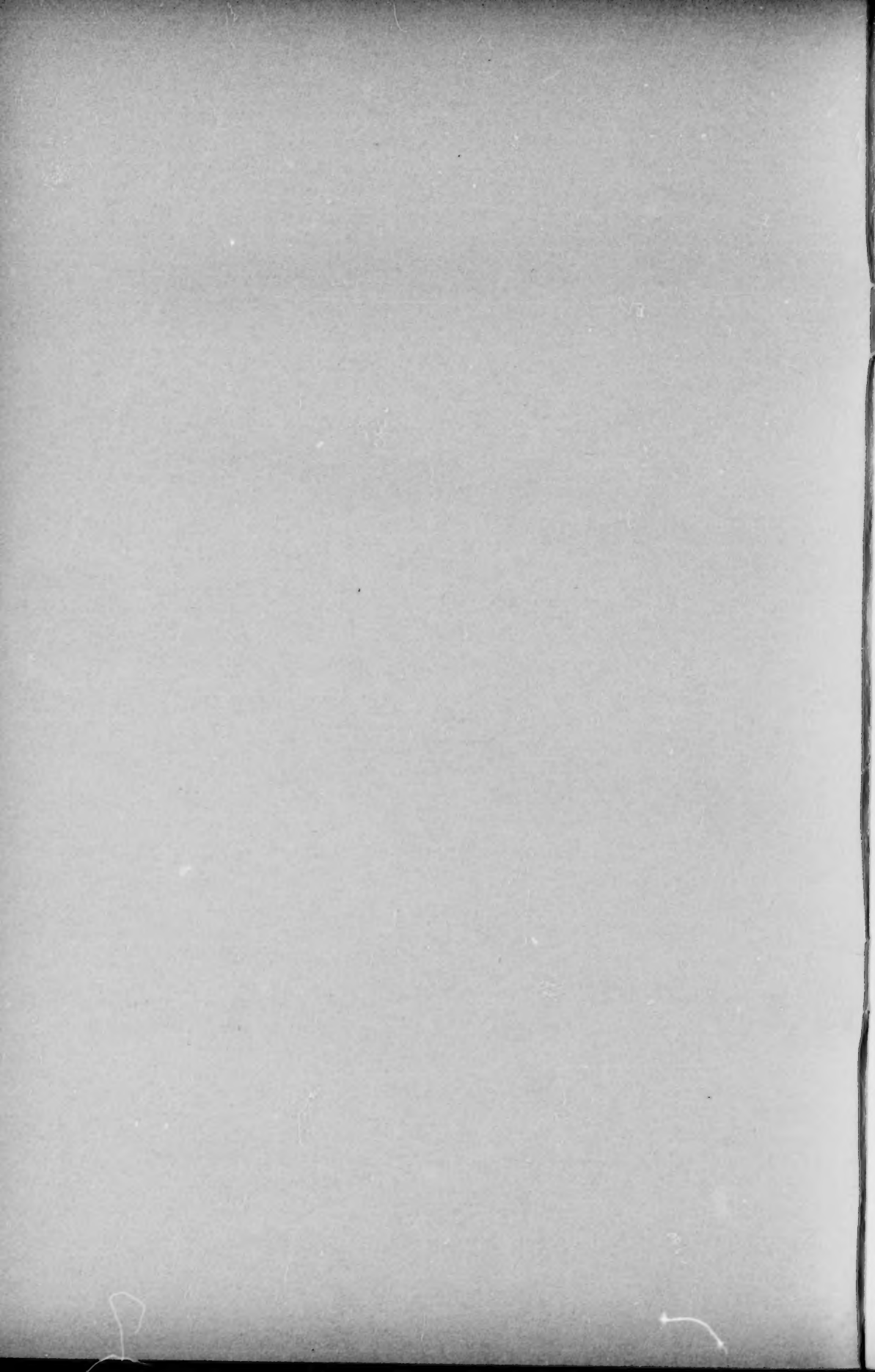


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ARGUMENT

Respondent's Brief in Opposition attempts to avoid review by obfuscating the real issues before this Court. The Civil Rights Act of 1991, 137 Cong. Rec. 15275 (daily ed. Oct. 25, 1991), does not eliminate or diminish the importance of the issues presented because it addresses a statute of limitations issue while this case involves a substantive issue of what constitutes discrimination. Similarly, respondent's assertion that the seniority system in this case is "facially discriminatory" and assertedly was adopted for an intentionally discriminatory purpose rests on repeated misstatements of the allegations of plaintiff's own complaint.

1. Respondent claims that the Ninth Circuit's decision no longer presents an issue worthy of this Court's attention because "Congress' recent amendment of Title VII through the Civil Rights Act of 1991 . . . has significantly reduced, if not eliminated, the importance of the Ninth Circuit's decision for future Title VII seniority cases." Br. in Opp., p. 8. This assertion is belied by contrary assertions by respondent's counsel elsewhere, which describe the Ninth Circuit's decision as "ground-breaking."¹

¹ Immediately after the ruling, The San Francisco Recorder reported respondent's lawyer's claim that the ruling "could affect many women at the telephone company and at other firms with similar policies." S.F. Recorder, Aug. 13, 1991, p. 12. App. 8a. The report characterized the Ninth Circuit's decision as "the first to apply [this Court's 1986 decision in *Bazemore*] to nonpay benefits." *Id.*

In a November 11, 1991 letter soliciting new members, respondent's lawyers, Equal Rights Advocates, stated that the Ninth Circuit's decision was "groundbreaking." A copy of this letter is appended to this reply brief at App. 1a. In a separate brochure, Equal Rights Advocates noted "hundreds of thousands of women in this country could be affected" by this case. This page is also appended at App. 5a.

In fact, it is clear that the 1991 Amendments have no bearing on this case.² As pointed out in the Petition (p. 10 n. 5), section 112 of the 1991 Act overrules this Court's decision in *Lorance v. AT&T Technologies* on a narrow statute of limitations point by allowing a seniority system that was "adopted for an intentionally discriminatory purpose" to be challenged when it is applied to the plaintiff, as well as when it was originally adopted. However, this case does not involve any statute of limitations issue. Rather, under this Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977) and *Teamsters v. United States*, 431 U.S. 324 (1977), Pacific Bell's 1987 decision to base the ERO on long-standing seniority dates was *not a current act of discrimination*. The court of appeals' decision disregards the fundamental distinction between a present act of discrimination, on the one hand, and the present effect of a prior act that results from the application of a seniority system, on the other.

Respondent's claim that this case turns on the question of "what constitutes a timely challenge to a seniority or service crediting system" (Br. in Opp., p. 8) simply underscores the critical error that infected both respondent's claims and the Ninth Circuit's decision upholding them – the inability to see that the question was not whether respondent had made a timely charge of discrimination, but rather whether Pacific Bell's decision to base a benefit on seniority was a discriminatory act at all. The 1991 Act does not address or alter this fundamental

² Moreover, contrary to respondent's implication (Br. in Opp., p. 11), the 1991 Act should have no bearing on future proceedings in the district court, both because it is irrelevant to the issues in this case, and because the better view is that the Act should not be applied retroactively. See Equal Employment Opportunity Commission, Notice No. 915.002, Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (Dec. 27, 1991).

substantive point in any way,³ as counsel for respondent have recognized in stressing the importance of this case in other settings. See n. 1, *supra*.

The court of appeals' decision thus continues to have an unsettling effect on proper public and private enforcement of the law. That effect is not limited to the Pregnancy Discrimination Act (42 U.S.C. § 2000e(k)) (PDA), or to Title VII. The rationale of the court of appeals, if accepted, would require employers continually to revise existing seniority dates to give retroactive effect to any new legal requirement by reversing long-closed employment decisions that were lawful when they were made. These uncertainties pose a major current problem for employers both within and outside the Ninth Circuit. Employers are presently and continuously required to make benefits and other employment decisions, to establish and amend employee benefit plans, and to make a myriad of employment decisions that are affected by the Ninth Circuit's decision.⁴ The uncertainties, risks and deterrence of the use of seniority for such purposes created by the Ninth Circuit's decision cannot adequately

³ Not only are the provisions of the 1991 Act on their face irrelevant to any issue in this case, but the legislative history of that Act also establishes that it makes no alteration in section 703(h)'s protection of the use of seniority as a basis for employment decisions, and does not affect this Court's decisions in *Teamsters* and *Evans*. See 137 Cong. Rec. S15477 (daily ed. Oct. 30, 1991) (statement of Senator Dole).

⁴ Respondent's suggestion that these uncertainties should be lessened because this case does not involve "competitive status" seniority (Br. in Opp., p. 6) has no legal support and makes no sense. No authority prescribes different rules for different seniority systems, depending on their purpose. It is unimaginable that employers will want to maintain two different seniority dates, with different retroactivity rules, depending on whether the seniority date has a "competitive status" purpose.

be addressed by subsequent litigation in the lower courts.⁵

2. Respondent's arguments addressed to the merits rest on repeated misstatements of the allegations of her own complaint. The crux of respondent's argument is that *Teamsters* and *Evans* are inapposite because, according to respondent, this case does not involve the alleged current discriminatory impact of a facially neutral seniority system, but an existing policy by Pacific Bell to discriminate against pregnant women. Thus, respondent claims that Pacific Bell "*does not credit towards pension eligibility . . . pre-1979 absences due to pregnancy disability but does credit pre-1979 absence due to all other temporary medical disabilities*" (Br. in Opp., pp. 12-13 (emphasis added)) and that "[i]t is PacBell's policy to exclude from the net credited service calculation all pre-Pregnancy Discrimination Act pregnancy disability leaves." Br. in Opp., p. 4 (emphasis added).⁶ Elsewhere she repeatedly

⁵ Respondent also implies that the 1991 Act is relevant because Pacific Bell's long-standing service crediting system was "adopted for an intentionally discriminatory purpose." Br. in Opp., p. 9. However, there can be no serious claim that petitioners intended to discriminate when, long prior to respondent's 1972 pregnancy leave, Pacific Bell's predecessor companies first adopted the concept of net credited service as a basis for employee benefits. Despite respondent's misleading citation of the complaint (see Br. in Opp., p. 9 n.5), the complaint does not so allege. Respondent's citation is to a boilerplate allegation of discrimination appended to her description of Pacific Telephone's 1972 decision to treat her pregnancy leave as a personal leave rather than as a disability leave. However, not only was that decision totally unrelated to petitioners' previous adoption of the seniority system itself, but the 1972 decision could not have been "intentionally discriminatory" because it admittedly was completely lawful when it occurred.

⁶ Elsewhere, respondent states that in 1984, Pacific Bell "created various and numerous personnel policies, including policies for calculating employees' service credit" (Br. in Opp.,

(Continued on following page)

describes the net credited service system as "not facially neutral." Br. in Opp., pp. 16-18.

These misleading statements imply that Pacific Bell is claimed to have had a policy or policies overtly making pregnancy a factor in eligibility for the ERO. The undisputed truth, as alleged by respondent's own complaint, is that "at all times relevant herein, defendants maintained a Net Credited Service Date for each of defendants' employees. Defendants used and use each employee's Net Credited Service Date to measure an employee's length of service for purposes of determining entitlement to and eligibility for defendants' various employee benefits and pension plans." First Amended Compl., ¶ 34, ER 8. The 1987 ERO was, as respondent's complaint alleges, "dependent upon an employee's Net Credited Service Date." Compl., ¶ 40, ER 10.

Thus, the repeated references to supposed current "policies" which supposedly discriminate "on their face" are merely respondent's argumentative characterization. The undisputed fact is that respondent has had at all times since 1972 a net credited service date. That net credited service date incorporates the 1972 service crediting decision she wants to reopen. Pacific Bell applied the existing net credited service dates of all employees in determining eligibility for the ERO, as it does for all benefits. In so doing, it did not refer to pregnancy at all.

Respondent misstates the record even more blatantly when she asserts that in 1987 Pacific Bell "chose to *adjust* Pallas' term of employment to exclude her 1972 pregnancy leave but it did not adjust other ERO applicants'

(Continued from previous page)

p. 2), and that "under PacBell's service crediting policies, employees disabled by pregnancy prior to 1979 do not receive service credit" (Br. in Opp., p. 3). In the same vein, respondent asserts that Pacific Bell "drew up criteria for what service would count towards an employee's Net Credited Service date and its pension plans" which allegedly expressly excluded pre-1979 pregnancy leaves. Br. in Opp., p. 15.

terms of employment to exclude their disability leaves from the same period." Br. in Opp., p. 14 (emphasis added). The truth, as admitted by respondent's complaint, is that the exclusion complained of occurred in 1972 and remained unchanged "at all times" thereafter. First Amended Compl., ¶ 34, ER 8. The only thing that occurred in the 1987 ERO offer was Pacific Bell's decision to base eligibility for a benefit on seniority. Because respondent specifically raised the issue, Pacific Bell denied her request to *revise* her long-standing net credited service date to include the period of her 1972 pregnancy disability as she demanded.⁷ In the same vein, the "inclusion" in the net credited service dates of other employees' periods of disability did not occur in 1987 but instead occurred whenever those leaves took place.

Respondent is thus attempting to transform an act which occurred in 1972 into an act which occurred in 1987 by equating a 1972 exclusion from respondent's net credited service date with a 1987 decision to exclude her pregnancy leave. She argumentatively alters the tenses of verbs from something the Company "did" to something the Company "does." She similarly speaks as if the eligibility criteria for Pacific Bell's 1987 ERO on their face refer to pregnancy when, as her complaint avers, they refer solely to net credited service.

Pacific Bell *does* treat pregnancy leaves in exactly the same manner as all other disability leaves (as it has at all times since the enactment of the PDA in 1979). Thus, Pacific Bell's policies were in complete accord with the EEOC guidelines quoted by respondent (Br. in Opp., p. 15), which required that following the effective date of

⁷ As noted in the Petition, p. 5, n. 2, Pacific Bell did make a 1987 adjustment to *include* a period in which she claimed she was able and available for work but was allegedly prevented from working by Pacific Bell's predecessor. This 1987 adjustment is not complained of by respondent, except that it did not go far enough to satisfy her.

the PDA, a company must provide for the accrual of seniority for disability due to pregnancy on the same terms and conditions as for other disabilities. However, nothing in the EEOC's post-PDA guidelines purports to require employers to revise established seniority dates to give retroactive effect to new legal requirements, as respondent contends in this case.⁸

3. Respondent's entire attempt to reconcile the decision of the court of appeals with Congress' protection of seniority systems in section 703(h) and with this Court's decisions in *Teamsters* and *Evans* is based on the erroneous contention that Pacific Bell's seniority system is "not facially neutral." Again, however, respondent has chosen to misstate the undisputed and undisputable facts admitted by her own complaint. While respondent conclusorily asserts that Pacific Bell's ERO is "facially discriminatory," she ultimately is forced to acknowledge that Pacific Bell's benefits "are merely based on an employee's years of service *and do not specifically mention pregnancy*." Br. in Opp., p. 13 (emphasis added). Thus, when respondent's argument is stripped of its rhetorical varnish, it is clear that respondent regards Pacific Bell's seniority system as "facially discriminatory," no matter what it says, simply because it incorporated Pacific Telephone's lawful 1972 decision to treat her pregnancy leave as a personal leave rather than as a disability leave.

No authority supports respondent's all-inclusive definition of a "facially discriminatory" seniority system. If respondent's contention were accepted, then every seniority system that arguably incorporates the results of some previous act of alleged discrimination, including the seniority systems at issue in *Teamsters* and *Evans*,

⁸ At the very least, the interpretation of the EEOC's guidelines contrary to the obvious import of their language urged by respondent is of such significance to proper enforcement of Title VII that it should not be accepted without requesting the Solicitor General to provide this Court with the government's views.

would be facially discriminatory, and this Court's decisions sustaining the use of seniority for making employment decisions would be meaningless.

Respondent contends that the use of seniority in *Evans* was upheld notwithstanding its present discriminatory effect on women who had married and been discharged as a result because it "treated similarly situated males and females the same" by denying service credit to all former employees, whether they had voluntarily resigned or were forced to resign for a discriminatory reason. Br. in Opp., p. 17. But here, precisely as in *Evans*, all employees are denied service credit for periods of personal leave, regardless of whether those personal leaves were on account of pre-1979 pregnancy or for some other reason. Thus, in this case, precisely as in *Teamsters* and *Evans*, the use of seniority may perpetuate the effects of a previous act that is now claimed to have been discriminatory, even though it was lawful or was not challenged when it occurred.⁹

4. Respondent claims that this Court's decision in *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) supports her all-inclusive definition of "facially discriminatory." In *Newport News*, however, the policy said on its face that "[m]aternity benefits for the wife of a male employee" would be different from disability benefits. 462 U.S. at 672. In *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) the plan was challenged, because, by its terms, "a man receives larger

⁹ Respondent argues that other seniority systems will not be affected as long as they are not facially discriminatory. The point of this case, however, is that if incorporation of a long-past act into a seniority date makes Pacific Bell's seniority system "facially discriminatory" unless all previous decisions that affect seniority are "correct" judged by subsequently enacted legal standards, then all seniority systems are "facially discriminatory" and use of all such systems is in jeopardy.

monthly payments than a woman who deferred the same amount of compensation and retired at the same age, because the [actuarial] tables classify annuitants on the basis of sex." 463 U.S. at 1077. In *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) the employee "required its female employees to make larger contributions to its pension fund than its male employees." 435 U.S. at 704. In *International Union UAW v. Johnson Controls*, ___ U.S. ___, 111 S.Ct. 1196 (1991) the employer had a written policy that "women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure" 111 S.Ct. at 1200. Thus, in all of the cases cited by respondent, an employer's current plan expressly and in specific terms drew a distinction based on the forbidden criterion. In this case, Pacific Bells's ERO relies solely on seniority and, on its face, draws no such distinction.

5. Respondent's treatment of the court of appeals' decision that alleged discrimination in the design of an ERISA benefit plan constitutes a fiduciary breach also attempts to obfuscate the issue by misstating the record. In particular, respondent asserts that all that the court of appeals held was that respondent had alleged that Pacific Bell misinterpreted the terms of the ERO by determining to base eligibility for benefits on net credited service (rather than some other measure of service). Br. in Opp., pp. 25-26. She asserts that "Pallas challenges PacBell's insistence that eligibility under the ERO depends upon a Net Credited Service date." *Id.* But respondent's own complaint clearly alleges that in 1987, Pacific Bell adopted the ERO "pursuant to which employees with certain amounts of net credited service, as reflected by their net Credited Service Date, were eligible to retire and receive pension benefits. The ERO included several plan options, eligibility for each of which was dependent upon an employee's Net Credited Service Date." *Id.*, ¶ 40, ER 10 (emphasis added).

Thus, while respondent now seeks to avoid review by this Court by describing this case as nothing more than an alleged "misinterpretation" of the ERO by Pacific Bell, the case that respondent actually alleged specifically claimed that the ERO itself, like Pacific Bell's other benefits plans, explicitly based eligibility for benefits on an employee's net credited service and sought to change this provision of the plan. Moreover, as pointed out in the petition, when the district court offered respondent an opportunity to amend her complaint to properly allege a claim that Pacific Bell had misinterpreted the terms of the ERO, respondent declined that opportunity. As demonstrated in the Petition (pp. 24-30) the court of appeals' decision that in designing its plan to base eligibility for the ERO on net credited service, Pacific Bell committed an act of "discrimination" that violated the fiduciary duty provisions of ERISA conflicts with the decisions of other circuits and warrants review by this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX
EQUAL RIGHTS ADVOCATES

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November 11, 1991

Dear Friend,

We were delighted that you were able to join Equal Rights Advocates at its Annual Luncheon in June where we honored three remarkable Bay Area women – Ina F. Dearman, May S. Kurka and Helen Rodriguez-Trias, M.D. – for their impressive contributions to community service, the arts and health care. These women are an inspiration to us all, and their courage and commitment motivate ERA's dedication to the ongoing struggle against sex and race discrimination.

As you probably know, ERA has successfully worked to ensure equal opportunity for women and minorities for more than 17 years through legal action in the courts and public policy arena, as well as public education and media efforts. But one merely has to glance at the paper or listen to the evening news to know that the rights of women are in grave danger indeed. An increasingly conservative judiciary is actively dismantling the foundation of federal anti-discrimination law as well as eroding women's reproductive rights. And the recent disclosure of Professor Anita Hill's charges of sexual harassment against Supreme Court nominee Clarence Thomas, which highlighted the issue of sexual harassment in the workplace as never before, has resulted in a dramatic increase

for advice and counseling, not only here at ERA but at women's rights organizations across the country.

The fact is, recent events have greatly increased the demand for ERA's services across the board. In order to meet these critical needs and to maintain our ability to respond to future crises, ERA simply must expand its base of support. **That is why I am writing you today to ask you to consider becoming a member of Equal Rights Advocates.**

When you become a member of ERA, you will join many other concerned citizens throughout the country who are fighting to counter the conservative shift in our country's political climate and to tenaciously hold the line in the fight for equality under the law for women and minorities. Thanks to their loyal support, ERA has been able to persevere on many critical fronts and achieve several significant victories during this past year alone:

- ** EEOC & Castrejon v. Tortilleria La Mejor – This case is the first in the nation to address the rights of undocumented workers under Title VII of the Civil Rights Act since the passage of the 1986 Immigration Reform and Control Act, which prohibits the employment of undocumented workers. On February 20, 1991, a federal district court ruled in ERA's favor, handing down a landmark decision which grants undocumented workers legal protections against employers who violate labor and civil rights laws.
- ** Pallas v. Pacific Bell – On August 12, 1991, the Ninth Circuit Court of Appeals ruled in favor of ERA client Lana Pallas, who is suing Pacific Bell for sex discrimination because the phone company refused to credit toward her retirement the personal leave she was forced (by company policy) to take off for pregnancy

– while crediting other temporary medical disability leaves. The court ruled that PacBell's policy was illegal under federal and California laws, which forbid treating pregnancy disability leaves differently from other medical disability leaves. This groundbreaking lawsuit is an important first step toward eradicating the "second stage" of pregnancy discrimination which a significant number of older working women will face as they become eligible for retirement.

- ** "Little Hoover" Commission Hearings on Women in the Trades – ERA was instrumental in persuading California's "Little Hoover" Commission to hold public hearings to investigate allegations that the state's Division of Apprenticeship Standards misused state funds by failing to exercise its responsibility to integrate women into apprenticeship programs in the building trades. ERA's efforts helped to focus public attention on the lack of representation of women in the trades, with feature articles appearing in numerous newspapers including the *New York Times* and *Los Angeles Times*, and prompted the formulation of effective public policy strategies to reverse this trend.

As these victories demonstrate, ERA's litigation strategies bolstered with effective public education and media efforts enable us to successfully challenge unfair laws, regulations and employment practices that systematically discriminate against women and minorities.

And with your help today, ERA will be able to continue its efforts on behalf of women in the year ahead. For example, ERA's lawyers are currently investigating claims that the San Francisco Fire Department has failed to meet its obligation under a court-approved consent decree to provide women firefighters with necessary equipment and properly-fitting uniforms. Our case

docket also includes a lawsuit to obtain compensatory damages for more than a dozen women workers, many of whom were the victims of sexual harassment in the workplace. These individuals have already won employment discrimination cases before the California Fair Employment and Housing Commission (FEHC), only to have their awards denied by a subsequent California Supreme Court ruling which stripped FEHC of its authority to award compensatory damages.

During ERA's early years, the courts were an arena to which women and minorities could affirmatively turn to guarantee their rights. The current conservative trend in the courts, however, have made it critical that we find more creative and effective strategies for battling sex and race discrimination in this country. That is why becoming a member of Equal Rights Advocates right now is so important. Your support will help us remain a strong, viable and creative force as we strive to win full equality for all women. **I hope we can count on your support today.**

Sincerely,

/s/ Nancy Davis
Nancy L. Davis
Executive Director

P.S. I have enclosed a complementary copy of ERA's quarterly newsletter, which contains highlights of the 1991 Annual Luncheon as well as updates on some of the important cases ERA is pursuing. I trust that you will find much within its pages to warrant your support of our work.

Equal Rights Advocates, Smiles to the Victors, Stories of Six Courageous Women: Lana Pallas.

Riverside, California, in 1972 may not strike you as likely setting for a small revolution – unless you know Lana Pallas.

The local phone company certainly didn't. As far as company officials knew, she was one of the many women who came out of high school in 1967 with a job application in hand. Lana needed a job, and her mom, who had worked for the phone company her entire life, urged it on her as a place to work that offered safety and security.

The company hired her into its traditional entry-level job for young women, information operator. She worked on whatever shift she was assigned to, took home a biweekly paycheck, and soon moved into other areas of the phone company's operation. Over the next few years Lana was a line assigner for cable assignments, an installer, and a central office staffer. Along the way she got married and in 1972 decided to have a child.

Twenty years ago, pregnant women were dealt with very differently than they are today. It was assumed they would take time off, but typically they were placed on unpaid personal leaves rather than on medical disability leaves. When Lana was ready to have her baby and was given the leave papers to sign, she refused, saying, "I do not want to be forced to take an unpaid personal leave. I'll just call in sick and come back to work as soon as possible."

The company was insistent. But so was Lana. She refused again and again, until finally the company forced her supervisor to sign the papers for her.

Knowing that what the phone company was doing was wrong, she went to the regional office of the Equal Employment Opportunity Commission, filed a complaint, and was told that, indeed, the company policy was discriminatory to women. Men who were temporarily disabled were able to take disability leave – why should women temporarily disabled due to pregnancy be treated differently and forced to take personal leave?

Unfortunately, Lana never followed through with the EEOC claim. She took a week's vacation, went into labor, and her daughter Brandi was born. After six weeks, her doctor released her to go back to work, but the phone company said no. She was forced to stay home an additional two weeks before the company would let her come back to work.

Little did Lana know that more than a decade later this incident would come back to haunt her. She stayed with the phone company, eventually moving to Northern California and going into management. In 1987, the company offered management an early retirement program, and Lana applied, thinking that it might be time for a new career. But she ran into a problem: Her 1972 pregnancy-related forced personal leave did not count toward "net service credit," although medical disability leaves were counted. As a result, she was three days short of the 20 years of service she needed to qualify for the retirement program.

This time Lana knew she was going to fight back. With Equal Rights Advocates' help, Lana brought a lawsuit in federal court, and recently won a 9th Circuit decision reversing the district court that had dismissed

her case. The appeals court ruled that the company's retirement plan was discriminatory and illegal because it did not count toward "net service credit" personal leaves that were actually temporary disability leaves due to pregnancy while it credited all other medical disability leaves.

Lana feels vindicated at last. People are calling to congratulate her and tell her their stories of woe as well. Right after she won her appeal, a colleague went so far as to leave a ten-dollar bill on her chair at work with a note saying. "From a grateful Pacific Bell employee - have an [sic] nice lunch on me."

Hundreds of thousands of women in this country could be affected by the lawsuit brought by Equal Rights Advocates and its co-counsel objecting to Pacific Bell's policy that denied Lana Pallas her early retirement because of a pregnancy leave she was forced to take in 1972. This groundbreaking lawsuit challenges the "second stage" of pregnancy discrimination that a significant number of older working women will face as they become eligible for retirement and other benefits. Indeed, since the 9th Circuit ruled that Pacific Bell's policy was discriminatory and illegal, ERA has received many phone calls from women who believe they have been victims of similar policies.

THE RECORDER, TUESDAY, AUGUST 13, 1991, PAGE 12

PacBell Manager Wins Pregnancy Leave Ruling

ASSOCIATED PRESS

Women who were denied pregnancy job leave before a 1979 federal pregnancy discrimination law was passed were given a boost toward equality in pension benefits Monday.

The Ninth Circuit U.S. Court of Appeals ruled 2-1 that a female employee of Pacific Bell was entitled to the same retirement credit for a pre-1979 "personal" leave during pregnancy that other employees were given for disability leaves.

A lawyer for the woman in the case said the ruling could affect many women at the telephone company and at other firms with similar policies.

"My understanding is it's fairly standard for employers to exclude time taken for pregnancy leave prior to 1979" when calculating retirement credit, said attorney Maria Blanco of Equal Rights Advocates.

She said the ruling, the first on the issue by a federal appellate court, was "very uplifting . . . in this anti-civil rights climate that federal courts seem to be in."

Pacific Bell had no immediate comment.

Pacific Bell, like many other companies, did not grant disability leaves for normal pregnancies before 1979, when the Pregnancy Discrimination Act required employers to allow the same leaves and other benefits for pregnancies that were provided for other work disabilities.

The company now provides pregnancy disability leaves. But when it offered management employees with 20 years of service an early retirement program in 1987, Pacific Bell did not credit them with time spent on leave for "personal" matters, as pregnancy leaves were classified before 1979. Workers were credited for periods of disability leave.

The policy left Lana Pallas, a supervisor in the company's San Ramon office, three to four days short of the 20-year standard by the company's cutoff date because of a pregnancy leave she had taken in 1972. Her civil rights suit was dismissed by U.S. District Judge D. Lowell Jensen but reinstated by the appeals court.

Although Pacific Bell violated no law by denying pregnancy leave before 1979, the company "is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy," said the opinion by Judge Mary Schroeder.

She said the program "facially discriminates against pregnant women" by treating them less favorably than other employees who took leaves for temporary disabilities before 1979. Because of that discrimination, Schroeder said, the program is not saved by U.S. Supreme Court rulings upholding employer seniority systems that harm a particular group but are neutral on their face.

She cited a 1986 Supreme Court decision prohibiting employers from maintaining pay disparities that stemmed from workplace racial segregation before passage of the Civil Rights Act. Blanco, Pallas' lawyer, said Monday's ruling was the first to apply the 1986 decision to nonpay benefits.

Judge Jerome Farris endorsed the opinion. In dissent, U.S. District Judge Edward Dumbauld of Pennsylvania, sitting by assignment, said the company had used a legitimate and legally authorized seniority system.

Pallas' grievance "is one that belongs to history," Dumbauld wrote. "It is not a current violation of law."

Blanco said the ruling was aimed at a specific retirement program, but its reasoning appeared to apply to any retirement benefits that treat pre-1979 pregnancy leaves unequally. She said she would seek to broaden the suit to cover other women at Pacific Bell who were affected by the policy.

Pallas, who is not eligible for the regular retirement program until 1997, remains with the company, Blanco said.
